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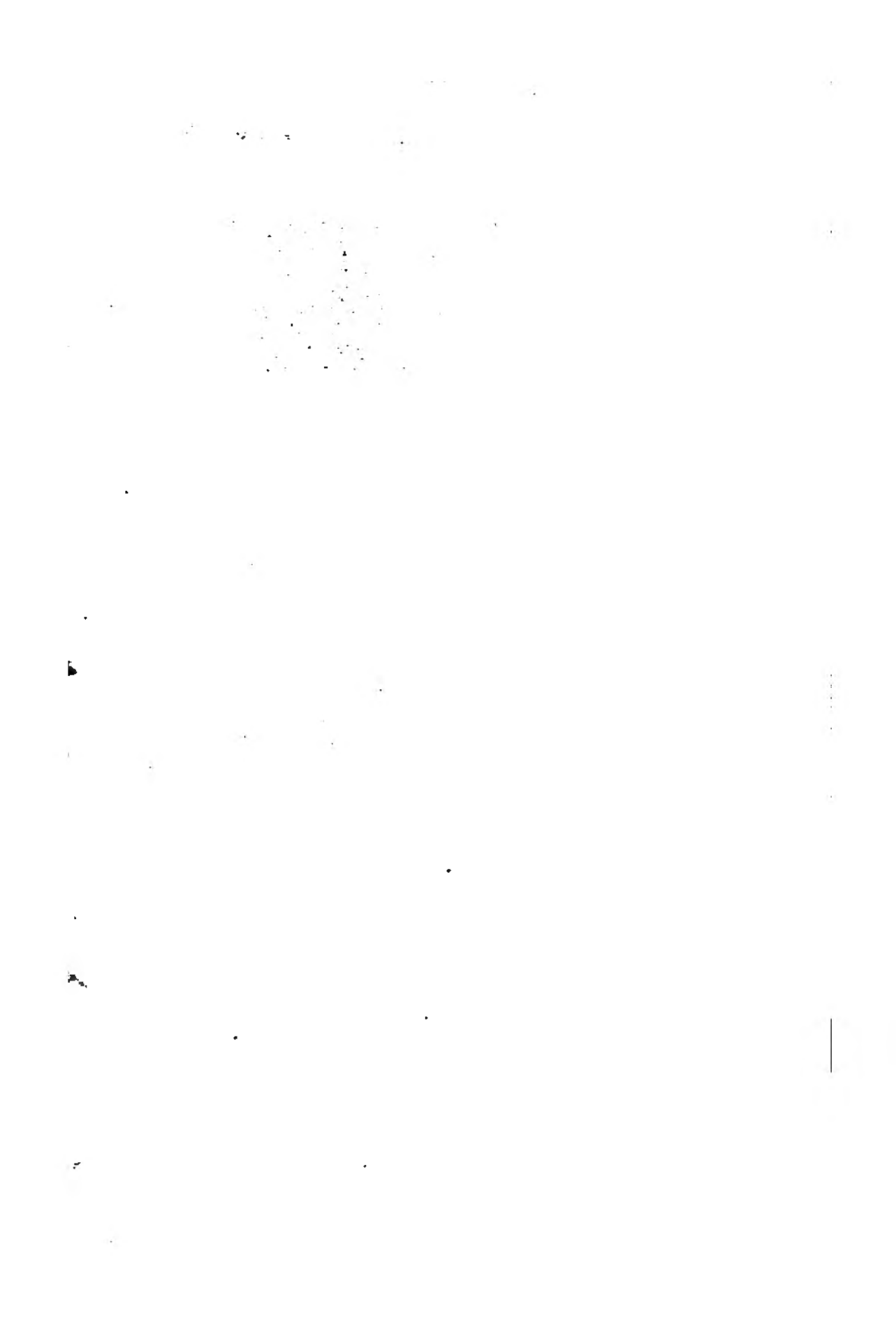
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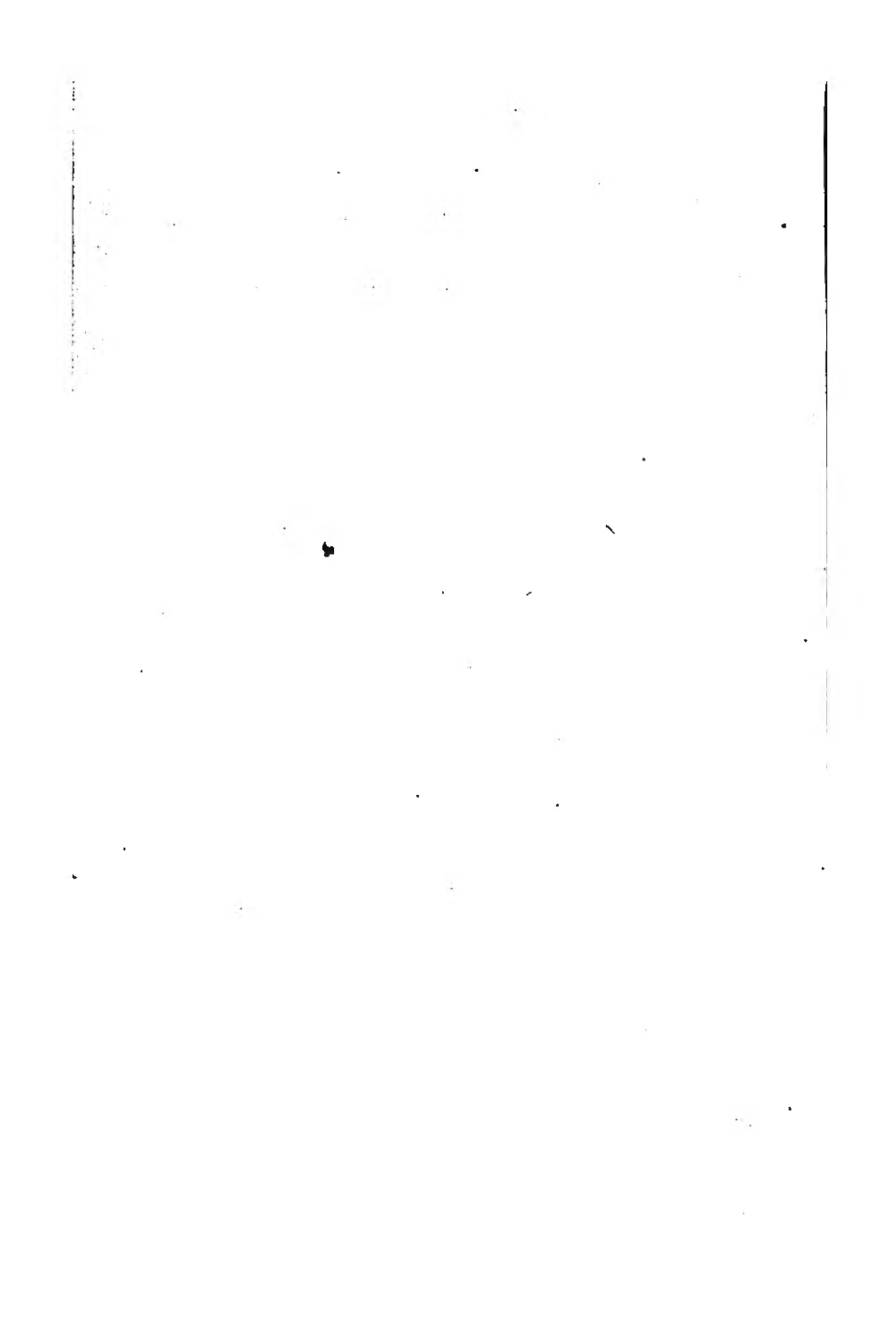
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H. M. JOHNSTON,
FRESNO, CAL.









T H E L A W

OF

MUNICIPAL CORPORATIONS

BY

JOHN F. DILLON, LL. D.,

**THE CIRCUIT JUDGE OF THE UNITED STATES FOR THE EIGHTH JUDICIAL CIRCUIT,
PROFESSOR OF LAW IN THE UNIVERSITY OF IOWA, AND LATE ONE
OF THE JUSTICES OF THE SUPREME COURT OF IOWA**

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TO THE HONORABLE
SAMUEL F. MILLER, LL.D.,

ASSOCIATE JUSTICE OF THE SUPREME COURT
OF THE UNITED STATES.

WHETHER I SHARE IN THE
GENERAL ADMIRATION OF YOUR JURIDICAL TALENTS,
OR LISTEN TO THE MORE PERSUASIVE SUGGESTIONS OF A VOICE
THAT COMES TO ME FROM
LONG ASSOCIATION AT THE BAR AND UPON THE BENCH,
THERE IS NO ONE TO WHOM I CAN INSCRIBE,
SO FITTINGLY AS TO YOURSELF,
A WORK
RELATING TO AN IMPORTANT BRANCH OF THAT SCIENCE
WHICH YOU HAVE STUDIED SO DEEPLY
AND UNDERSTAND SO WELL.

PREFACE TO SECOND EDITION.

THE favor accorded to this treatise by the profession is gratifying to the author and compensates for the great labor of its preparation. Nothing can be more pleasing to an author than the knowledge that the studious care given to a work is appreciated by those for whom it was written : their approving opinion is the reward he covets and enjoys.

The First Edition, published about twelve months ago, and of nearly double the usual size, has been exhausted, and at the request of the publishers the Second Edition has been prepared. As before, this has been the personal labor of the author. All reported cases, decided since the first publication, have been examined and the text and notes prepared without the assistance of others. While this edition embraces a summary of recent cases to the latest date and contains substantial additions, the structure of the work is unaltered. Some new sections have been added and others re-written. The principal changes have been made in the chapters which treat of Municipal Securities, Taxes, and Assessments. The amount of negotiable bonds of

Municipalities largely exceeds the sum of the indebtedness of all the States, and it has been the earnest endeavor herein to exhibit accurately the American law upon this important subject.

In conclusion, it is deemed fitting to express to the Bench and Bar of the country a sincerely grateful appreciation of the favorable judgment already pronounced, and a hope that the same, upon further examination of the work, may be neither reversed nor modified.

J. F. D.

DAVENPORT, *Iowa*, 1878.

PREFACE TO FIRST EDITION.

THE necessity for a work upon Municipal Corporations was so seriously felt by the author when holding a seat on the Supreme Bench of a state where questions relating to the powers, duties, and liabilities of municipalities were presented at almost every term, that he resolved, eight years ago and more, to endeavor to supply the want. Although the subject is one of unsurpassed practical importance, since nearly every considerable city and town in the United States is incorporated, no American work upon it has ever appeared. A careful examination of the English treatises satisfied the author that they were, in a great measure, inapplicable here, and that they fail to cover a large portion of the existing field of the law upon the subject as enlarged by American legislation and practice. True, our municipal system, like the body of our jurisprudence, was derived from England, but it is remarkable how many changes were necessary to adapt it to our system of government and mode of administration, and to the wants and situation of our people. Accordingly, if the municipalities of the one country be closely compared with those of the other, it will be found that in their structure, powers, and workings, they present quite as many points of difference as of similarity.

We have popularized and made use of municipal institutions to such an extent as to constitute one of the most striking features of our government. It owes to them, indeed, in a great degree, its decentralized character. When the English Municipal Corporations Reform Act of 1835 was passed there were in England and Wales, excluding London, only two hundred and forty-six places exercising municipal functions; and their aggregate population did not exceed

two millions of people. In this country our municipal corporations are numbered by thousands, and the inhabitants subjected to their rule by millions.

Our municipalities are habitually clothed by the legislatures with extensive, important, and diversified powers, and consequently possess a much more composite character than in England or elsewhere. Strictly, a municipal corporation is an institution designed to regulate and administer the mere local or internal concerns of the incorporated place in matters pertaining to it and not relating directly to the people of the state at large. But in this country, much more generally than in England, it is the practice to make use of the municipality, or of its officers, as agencies of the *State*, for the exercise, on its behalf, of *public*, in addition to *corporate*, duties and functions. From the difference between these two classes of powers the American courts have deduced consequences so important that it is as necessary, as it is oftentimes difficult, to distinguish between them. Besides, it has, unfortunately, become quite too common with us to confer upon our corporations extraordinary powers, such as the authority to aid in the construction of railways, or like undertakings, which are better left exclusively to private capital and enterprise, and to create, in their corporate capacity, indebtedness therefor, enforceable by actions in the courts, and which must be paid by taxation.

Invested, also, within certain limits, with delegated legislative authority concerning the property and conduct of their inhabitants; with power, more or less extensive, to acquire and dispose of property; with the power to elect their own officers; to make contracts; to incur liabilities; to exercise Eminent Domain; and the equally momentous power, to levy and collect taxes, general and special; these corporate agencies are thus brought into intimate and daily contact with the most important rights and interests of their inhabitants, and as a result, we have an amount and variety of litigation not to be found in the tribunals of other countries. In no English treatise on Municipal Corporations is there a chapter upon the subject of civil actions and liabilities, and no discussion of the question as to their amenability to respond civilly in damages to individuals for acts of misfeasance, or for neglect of duty; and for reasons not material to be here stated, the occurrence of questions of this kind

in the English tribunals has been comparatively infrequent. The American Reports, however, teem with cases on this subject, and the civil liability of municipal corporations upon contracts and for torts, and the mode of enforcing it, are with us the most important practical topics requiring treatment in a work of this character.

There being no American work on this branch of the law, and the decisions in this country relating to it being scattered through the reports of the federal courts, and those of thirty-seven states, there was little to guide the author, either as to the arrangement of his subject or as to what had been decided by the courts concerning it. Accordingly, he had no resource except to delve laboriously for his materials among hundreds of volumes; but these have, one by one, been examined by him with a view to find all that could be advantageously used to illustrate the subject, and the result is given, either in the text or notes, as fully as it was practicable within the compass of a single volume. Nor has he overlooked the aid to be derived from other sources. Every English publication relating to the subject in its legal or practical relations has been subjected to examination; books which could not otherwise be had have been specially procured from abroad. And, throughout the present volume, no inconsiderable pains have been taken to set forth wherein the English and American municipalities differ, so that the applicability and precise legal value of the judicial decisions of the former country would be better understood.

When the work was resolved upon, the author hoped to proceed with the leisurely care that would enable him to avoid the faults which thorough deliberation might result in correcting. This hope has not been as fully realized as he desired, for year by year his official duties have more and more encroached upon his time, leaving for this work only the diminishing intervals between courts. In its preparation he has often envied the author by profession the opportunity for continuous and unbroken labor, and he cannot but feel that if his work had not been prepared in fragments, it would not have fallen both so far below his ideal, and what, under more auspicious circumstances, he himself might have made it. It is hoped, however, if it shall lack the symmetry and finish such an author would have given it, that it may have compensating advantages in its thoroughly *practical character*; and these it will surely owe to that

experience to which the mere student or professional writer must ever be a stranger, and which can be had only upon the bench or at the bar.

Some peculiarities in the *manner* of its preparation will be observed. The aim throughout has been to make a work which will be useful to the profession. Aware that in most cases access to complete law libraries cannot be had, the author has endeavored, as far as practicable, to supply this want and to make the text and notes exhibit the substance of the adjudications. This explains why so much care has been taken to cite the cases bearing upon the subjects discussed, and accounts for the fullness of proofs and illustrations to be found in the notes.

He trustfully submits the Work, which fills up the interstices between judicial duties for nearly nine years, to the profession for whose assistance it is designed, and whose final judgment on it will not be otherwise than just. If he could be assured that it has a value at all proportioned to the labor first and last bestowed upon it, he would venture to hope for a judgment not altogether unfavorable.

DAVENPORT, IOWA, 1872.

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MUNICIPAL CORPORATIONS.

CHAPTER I.

MUNICIPAL INSTITUTIONS.—INTRODUCTORY HISTORICAL VIEW.

§ 1. It does not fall within the scope of the present treatise to give a detailed account of the origin and rise of cities and towns, nor to trace minutely the *history* of the rights, powers, and jurisdiction with which they are now generally invested. Such an inquiry more appropriately belongs to the legal antiquary or to the historian ; and yet a brief historical survey of the rise and progress of municipalities is essential to an intelligent understanding, even its practical bearings, of the subject of which it is proposed to treat. The origin of towns and cities, and the exercise by them, to a greater or less extent, of local jurisdiction, may be ascribed to a very early period.

Phœnicia and Egypt were long noted for their large and splendid cities. In the latter country, we find Memphis, one of the old world's proudest capitals, whose location, even, was, until very recently, a matter of learned conjecture and speculation. It was, centuries ago, buried beneath the sands of the encroaching desert, and in our own day it has been exhumed in the presence of Bedouins too wild to be interested in the wondrous revelations of its entombed mysteries. Temples and buildings, vast and magnificent, dating, probably, fifteen centuries before the Christian era, and preserved by burial, both from decay and spoilation, may to-day be seen almost in their original perfection. There, too, in "old, hushed Egypt and its sands," on the banks of the Nile, are the massive ruins of Thebes

(Diospolis), the city of "the hundred gates," ante-dating secular history, and claimed by the Egyptians to have been the first capital, as it undoubtedly was one of the oldest cities, of the world. As the eye runs along the colonnades of ruined temples, the mind runs back through the Egypt of the Ptolemies to the Egypt of the Pharaohs, four thousand years ago, when Thebes was in its splendor and its pride. But in the midst of these stupendous remains of this early civilization, we find no evidence of their municipal history and organization. The chief lesson they teach is, that they were the centres of great wealth and power in the governing classes, and that the *people*, who constitute the true wealth of modern cities, were at the absolute disposal of their masters, bound down and degraded by servitude.

§ 2. Notwithstanding the people of *Greece* were of a common blood, language, and religion, Greece was never politically united. Political power resided not in a number of independent states, but in a large number of free and independent *cities*, with districts of country adjoining or attached to them. Each city, except in Attica, was sovereign—was the sole source of supreme authority—and possessed the exclusive management and control of its own affairs. The citizen of one was a foreigner in the others, and could not, without permission or grant, acquire property, make contracts, or marry out of his own city. The Grecian heart always glowed with patriotic fervor for the city, but rarely, except in times of great common danger, kindled with a love for the whole country. And although, according to Chancellor Kent,¹ the "civil and political institutions of some of the states of Greece bear some analogy to the counties, cities, and towns in our American states," yet the analogy, it must be confessed, is both remote and uncertain, and without practical value in the inquiries we are to prosecute.

§ 3. *Municipal* as well as private corporations were familiar to the *Roman Law*. "To conceive," says a modern writer, "of ancient Rome as the capital of Italy in the same sense that London is the capital of England, or Paris of France, would be a great mistake. London and Paris are

¹ Kent Com. 268, note.

the chief cities of their respective countries, because they are the seat of government. The people of these cities and their surrounding districts have no privileges superior to those of other English or French citizens. But the city of ancient Rome, with her surrounding territory, was a great corporate body or community, holding sovereignty over the whole of Italy and the provinces.” None but persons enrolled on the lists of the tribes had a vote in the popular assemblies or any share in the government or legislation of the city.”¹ The common division of civic communities established by the Roman government was three, *prefectures, municipal towns, and colonies*. The prefectures did not enjoy the right of self-government, but were under the rule of prefects, and the inhabitants were subjected to the burdens, without enjoying any of the privileges of Roman citizens. But with the *municipal towns* it was different. They at length received the full Roman franchise, “and hence,” says the learned author just named, “arose the common conception of a municipal town; that is, a community of which the citizens are members of the whole nation, all possessing the same rights, and subject to the same burdens, but retaining the administration of law and government in all local matters which concern not the nation at large,”—a description which answers almost perfectly to the modern notion of municipal organizations in England and America. The *colonies*, composed of Roman citizens, were established by the parent city, sometimes to reward public services, but generally as a means of securing and holding the country which had been subdued by Roman arms. The constitution of these colonies, and the rights of the citizens and communities composing them, varied, but it is not necessary for our purpose to trace these differences. The colonies were obliged to provide for the erection of a city, and cities thus erected were called *municipia*. We thus perceive the justness of the observations of a distinguished modern historian and statesman, who says that “the history of the conquest of the world by Rome is the history of the conquest and foundation of a vast number of cities. In the Roman world in Europe

¹ Dr. Liddell, Rome, chap. XXVII. sec. 8

there was an almost exclusive preponderance of cities and an absence of country populations and dwellings." ' The nation was a vast congeries of municipalities bound together by the central power of Rome.

When the Romans colonized and settled the countries they had conquered they established fixed governments and carried with them, and to a greater or less extent necessarily imparted, their arts, sciences, language, and civilization to their new subjects. And although the political condition of the vanquished people was far from being desirable, still the immediate residence among them of the civilized Roman could not fail to produce effects more or less beneficial ; and thus the *municipia*, securing what the Roman arms had achieved, became the efficient means of spreading civilization throughout the Roman world.

§ 4. After the subversion of the Roman Empire the *towns of Europe* from the fifth to the tenth century were in a state neither of servitude nor liberty, though their condition differed greatly in different countries. During this period the power and influence of the towns were, in general, on the decline. The power of the church was great, and the inhabitants found their chief protection in the clergy.

The establishment of the *feudal system* worked a great

' M. Guizot's Hist. Civilization in Europe, Lect. II.: "Rome, in its origin, was a mere municipality, a corporation. In Italy, around Rome, we find nothing but cities—no country places, no villages. The country was cultivated, but not peopled. The proprietors dwelt in cities. If we follow the history of Rome, we find that she founded or conquered a host of cities. It was with cities that she fought, it was with cities she treated, into cities she sent colonies. In the Gauls and Spain we meet with nothing but cities; the country around is marsh and forest. In the monuments left us of ancient Rome we find great roads extending from city to city; but the thousands of little by-paths now intersecting every part of the country were unknown. Neither do we find traces of the immense number of churches, castles, country seats, and villages which were spread all over the country during the middle ages. The only bequests of Rome consist of vast monuments impressed with a municipal character, destined for a numerous population, crowded into a single spot. A municipal corporation like Rome might be able to conquer the world, but it was a much more difficult task to mould it into one compact body." *Il.* See also 2 Kent Com. 270, note ; Dr. Adam Smith's interesting chapter : *Wealth of Nations*, book III. chap. II.

change in the condition of the towns. Before that, towns, as we have seen, were the centres of wealth and population. The ruling class lived within them. The land was cultivated by persons who were not recognized as having political rights. After feudalism was established, this changed. The proprietor then lived upon his estates, instead of living within a town; the town became part of the lands of the lord, or enclosed within his fief. It, with its population, became thus subject to his arbitrary exactions, oppression, and pillage. Still the towns gradually prospered, and with prosperity came wealth; with wealth came influence and power. Such, in general, was the condition of the towns of continental Europe down to the eleventh century. About this time, without any union or concert, many of them in most of the countries of Europe rose against the lords, and demanded for the burgesses, commonalty, or inhabitants, a greater or less measure of enfranchisement. Sometimes a town failed in its struggle, and its oppression was redoubled by the victorious lord. Sometimes the towns were aided by the king, who was frequently not unwilling to humble the arrogant and haughty nobility, and thereby acquire the influence and affection of those whom he thus assisted. Not unfrequently, however, the struggle had to be maintained by their own unaided resources, and when successful, the result was the granting of CHARTERS, conferring more or less extensive municipal immunities and rights, by the lords to the burghers. These charters, as Guizot justly observes, were in the nature of "treaties of *peace* between the commons and their lords;" were, in fact, "bills of rights" for the people.¹ During the twelfth century, "all Europe, and especially France, which for a century had been covered with insurrections by burghers against their lords, was covered by charters more or less favorable; the corporators enjoyed them with more or less security, but still they enjoyed them."²

¹ People v. Morris, 13 Wend. 325, 334, per Nelson, J.

² Guizot's Hist. Civ. in Europe, lecture VII. This philosophic and valuable work is the source from whence are drawn most of the statements of the text as to the condition of the towns of Europe from the fifth to the tenth century. See similar account, Wealth of Nations, book III. chap. III.; Hallam's Middle Ages, chap. II. part II., and notes to later editions.

§ 5. After the overthrow of the Roman Empire and the civilization which accompanied the Roman power, Europe became indebted to cities and to the authority which they acquired, and the jurisdiction which they exercised for the creation of the third estate—popular power—and for the development of the principles of constitutional or free government.¹

The Italian cities, especially Venice, Genoa, and Pisa, grew rich from the commerce resulting from the vast armies which the Crusaders for two hundred years had successively pushed forward into the Holy Land. The oppressive feudal system was at this time in full force throughout Europe. These Italian cities used their power and wealth to secure their independence. Cities and towns, as well as people who dwelt in the country, were alike subject to the arbitrary and oppressive exactions of their feudal masters. Some of the cities in the eleventh century obtained their freedom by purchase, and some by force, and some by gift. They were, in effect, constituted so many little republics, with the right to manage their own concerns. In this way, before the end of the thirteenth century, nearly every considerable city of Italy was enfranchised or had received extensive corporate immunities from the sovereign or lord. The happy effects were soon perceived in the increased population and prosperity.

§ 6. Whether from example, as asserted by Dr. Robertson, or from other causes, the same course was adopted by the cities of other states in Europe. The king of France, Louis le Gros, and his great barons, granted many *charters of community*, by which the inhabitants were freed from feudal servitude and erected into municipal corporations, with the power of local self government. These charters

¹ "The institution of cities into communities, corporations, or bodies politic, and granting them the privilege of municipal jurisdiction, contributed more, perhaps, than any other cause, to introduce regular government, police, and arts, and to diffuse them over Europe." Robertson's Charles V.; see Hallam's Middle Ages, chap. II. part II. M. Guizot considers the three great elements of modern civilization to be the Feudal System, the Christian Church, the Commons, or free corporate cities; Civ. in Europe. Lecture VII.; see also Wealth of Nations, book III. chap. III., on "The Rise and Progress of Cities and Towns, after the Fall of the Roman Empire."

contained grants of new privileges, and prescribed salutary methods for the enforcement of rights and the redress of grievances. They are both interesting and instructive, and a brief view of their character is given in the note.¹

We meet, *in France*, with great diversity in the origin and government of towns and cities. In some of them, especially in southern France, the Roman municipal system, more or less modified from time to time, was perpetuated. The Roman system was formed upon an aristocratic model. In each *municipium* there was a senate, called an *ordo* or *curia*. This was, politically considered, the city; it was the governing body. The mass of the population, except in a few cases, had no voice in municipal affairs. This senate was

¹ *Abstract of municipal charter in the middle ages.*—In those turbulent times *personal safety* was an object of the first importance, and this was usually afforded to the vassal by the baron or lord. The communities or free towns which were instituted, undertook to provide for the safety of their members, independent of the nobles. For, 1. All the members were bound by oath to assist and defend each other against all aggressors. 2. All residents in a town made free, were obliged to take part in the mutual defence of its members. 3. The communities could execute the judgments of their magistrates by coercion, if necessary. 4. The practice of making private satisfaction for crimes was abolished, and provision made for the regular punishment of offenders. 5. A person reasonably suspected to be about to injure another, might, as with us at the present day, be compelled to give security to keep the peace. These communities also undertook to provide for the *security of property* by the following: 1. Abolishing the right of the creditor to seize the effects of his debtor with his own hand and by his private authority, and compelling him to proceed before a magistrate, who was authorized to issue the necessary process for the seizure and sale of property, humane and necessary exemptions being allowed. 2. Every member was obliged to bring some of his property into the town, or build a house, or buy land; and in some places the members were bound for each other. 3. Judgments by magistrates duly selected, took the place of the arbitrary and capricious decisions of the baron or feudal lord. 4. Arbitrary taxation was prohibited, and regulations for an equal tax were sometimes especially prescribed. Digested from Robertson's Charles V., vol. I. note XVI. Proofs and Illustrations. "The communities of France never aspired," says this accurate and elegant historian, "to the same independence with those in Italy. They acquired in France new privileges and immunities, but the right of sovereignty remained entire to the king or baron within whose territories the respective cities were situated, and from whom they received the charter of their freedom." *Ib.* Charters defined, *post*, secs. 15, 49. Municipal charters, treated of, *post*, chaps. V. VI. Outline of modern municipal charter in the United States, *post*, sec. 19.

composed of a comparatively small number of families, and the office was hereditary. When the body became thinned or reduced by death or otherwise, it was not filled by the people, the mass of the population, but by the survivors.

Other towns or communities originated, in the most natural manner, upon the fiefs or estates of the feudal proprietors. Many of these estates became centres or agglomerations of population composed of the working and industrial classes. Trade sprung up, and towns and cities originated. The lord, or proprietor, was interested in, and derived profit from, their prosperity. To induce others to settle there, he often conceded certain privileges. He did not emancipate them from all feudal restraints or domination, but these he mitigated. Often he granted lands and privileges to all who settled in towns on his domains, on receiving a moderate fixed rent and specified military services. These concessions had no higher origin than the personal interest of the proprietor, and were often violated. They did not constitute the towns locally independent, or make them true corporations. But limited and uncertain as these concessions were, the towns which received them prospered and became more or less important.

Other places were chartered towns and true corporations. In the twelfth century there was the general movement, before noticed, on the part of the towns of France, for their enfranchisement, or delivery from feudal bondage. The extent of this movement may be judged from the fact that the *royal* charters of this period are numbered by hundreds, and those granted by the *lords*, by thousands. These were, in general, wrested from the feudal proprietors by force, or the fear of it, and conferred an almost independent political existence upon the *commune*, or town. These charters gave the community the power of having its people judged for offences by magistrates of their own choosing; crimes and punishments were defined; arbitrary rents and taxes abolished, and fixed rents and regular taxes substituted; *main-morte* and other restraints upon the alienation and enjoyment of property were removed. The government of towns thus created, unlike those which were mere perpetuations of the Roman system, was formed upon a *democratic* model. A voice was given to all burghers, or persons of a certain fortune, or who exercised

a trade or calling. In a word, with considerable diversity, this class of towns was independent, and possessed, in local matters, the power of self-government. From and after the fourteenth century, the political power and influence of the towns of France decayed. The causes of this decline have been traced, with a masterly hand, by M. Guizot, but they do not relate to our purpose.¹ In the course of change, we may remark, that the royal power over them became predominant, and instead of being self-governed, they were and are, administered by the intendants, or officers of the king or emperor, or central authority at Paris.

Towns, or *communes*, in modern France are governed by a mayor and council. By the law of 1855, in all *communes* of 3,000 inhabitants and upwards, these officers are appointed by the emperor; while in smaller *communes* the appointment is made by the prefect of the department, himself appointed by the emperor. The prefect may suspend municipal councillors, but the emperor alone can dismiss them.²

§ 7. It seems to be well established, that the *towns and cities of Spain* acquired charters of freedom at an earlier period than towns in France, England, or Germany.³ The cities of Italy, as we have seen, owed, to a large extent, their freedom to their commercial importance and wealth; but

¹ History Civilization in France, Lect. XIX.; see, also, Hallam's Middle Ages, chap. II. part II. and notes.

² American Encyclopedia, *Commune*.

³ The most ancient of these regular charters of incorporation now extant was granted by Alfonso V. in 1020, to the city of Leon and its territory. It preceded, by a long interval, those granted to the burgesses in other parts of Europe, with the exception, perhaps, of Italy. Acts of enfranchisement became frequent in Spain during the eleventh century, several of which are preserved, and exhibit with sufficient precision the nature of the privileges accorded to the inhabitants. Robertson (in his History of Charles V. Introductory View), who wrote when the constitutional antiquities of Castile had been but slightly investigated, would seem to have no authority, therefore, for deriving the establishment of communities from Italy, and still less for tracing their progress through France and Germany to Spain. Prescott's Ferdinand and Isabella, Introduction, vol. I. note 24.

Hallam, who, as well as Prescott, founds his judgment upon the historical works of Marina and Sempere, expresses a similar opinion as to the early period at which the towns of Spain were invested with chartered rights and privileges. Middle Ages, chap. IV.; *Ib.* chap. II. part II. and notes.

those of Spain owed their privileges and jurisdiction to an entirely different cause. For nearly eight hundred years the Gothic inhabitants of Spain had been engaged in an almost uninterrupted struggle against the Moors or Arabs who occupied the southern part of the peninsula.¹ It was obviously the dictate of policy, as the Spaniards gradually narrowed the boundaries of their enemies' territory, to make provision for securing and holding the ground thus gained. With this view, and for the purpose of protecting themselves from the frequent raids of their Arab neighbors, liberal charters were granted to towns, with extensive districts of country subject to their municipal jurisdiction.

By these grants or charters the citizens selected their own officers, including judges and a common council, and enjoyed all the essential rights of freemen. In return, the community or city paid a certain (no longer an arbitrary) tax or rent, and owed military service. For more effectual protection, the charters frequently prohibited the nobles from acquiring real property or erecting fortresses or palaces within the limits of the community, and subjected them to its jurisdiction when within its territory. Large portions of the adjacent country, as we have said, often em-

¹ Mr. Irving's fine reflections, in his *Alhambra*, upon this protracted and famous contest between the Crescent and the Cross, are not inappropriate: "The singular fortunes of the Arabian or Morisco-Spaniards, form one of the most anomalous yet splendid episodes in history. A remote wave of the great Arabian inundation, cast upon the shores of Europe, they seem to have all the impetus of the first rush of the torrent. But repelled (by unsuccessful battle) within the limits of the Pyrenees, they gave up the Moslem principle of conquest, and sought to establish in Spain a peaceful and permanent dominion. Generation after generation, century after century passed away, and still they maintained possession of the land. With all this, however, the Moslem empire in Spain was but a brilliant exotic that took no permanent root in the soil it embellished. Severed from all their neighbors in the west by impassable barriers of faith and manners, and separated by seas and deserts from their kindred of the east, the Morisco-Spaniards were an isolated people. Their whole existence was a prolonged, though gallant and chivalric, struggle for a foothold in a usurped land. They were the outposts and frontiers of Islamism. The peninsula was the great battle ground where the Gothic conquerors of the north and the Moslem conquerors of the east met and strove for mastery; and the fiery courage of the Arab was at length (after 800 years) subdued by the obstinate and persevering valor of the Goth."

bracing towns and villages, were annexed to the city or community and placed under its laws and jurisdiction. "Thus," says Mr. Prescott,¹ to whom we are chiefly indebted for this sketch of the early municipalities of Spain, "while the inhabitants of the great towns in other parts of Europe were languishing in feudal servitude, the members of the Castilian corporations, living under the protection of their own laws and magistrates in time of peace, and commanded by their own officers in war, were in full enjoyment of all the essential rights and privileges of freemen."

§ 8. *Britain* was one of the last conquests of the Cæsars, and was one of the first of the western provinces upon which they released their hold. The Latin language did not become the language of the people; nor did the Romans, as in many of the continental provinces, fill the country with memorials of their skill and arts. The impressions made by the mastery of the Roman were not destined to be permanent. According to an accurate explorer and philosophic modern historian,² Britain, when subject to Rome, was divided into thirty-three townships, with a certain share of local self-government; and *quasi* municipal institutions, for a long time after the withdrawal of the Roman power, constituted whatever of government the people possessed. At the time of the conquest of England by William of Normandy (A. D. 1066), the towns and boroughs were dependent upon the uncertain protection of the king or lord, to whom they owed rents or service, and were liable to discretionary, that is, arbitrary, rates or talliages. They were not incorporated, did not constitute bodies politic; and being composed mainly of tradesmen and the lower classes, were regarded by their feudal masters as possessed of no political and of but few civil rights. None of them enjoyed the right of representation in the council of the nation, and, with the exception, perhaps, of London and a few of the greater towns, did not possess the right of internal or self-government. Some time between 1100 and 1125 Henry I. granted to London the original charter, in which were conferred many valuable municipal privileges,

¹ History Ferdinand and Isabella, vol. I. Introduction, sec. 1.

Sir James Mackintosh's History of England, vol. I. p. 80.

with the right, among others, to choose certain of their own officers, such as sheriff, justice, and the like.¹ But the right of local self-government was not, in general, conferred upon towns and boroughs until the time of John, who reigned from 1199 to 1216.² Meantime the towns and cities continued to grow in population and wealth, and as these increased, their disposition to submit to arbitrary exactions proportionately diminished, and their independent spirit and desire for freedom from oppressive restraints became more manifest; but still they did not acquire sufficient influence or importance to be allowed a representation in the states of the kingdom for more than two centuries after the conquest. It was not until the time of Edward the First that cities and boroughs, then mostly incorporated, obtained the right of returning members to parliament. The legislative power of the kingdom was at this time vested in the king and the council, afterwards called the parliament. This council was constituted of the spiritual and lay peerage. The commonalty of England had no voice or part in the legislature. This wise and politic prince was greatly distressed for money, and instead of attempting to raise it by the levy of arbitrary taxes or talliages, which were submitted to with murmurs and yielded sparingly, preferred to obtain it by the prior voluntary consent of the cities, towns, and boroughs. He hit upon this device. He caused writs to be issued to about one hundred and twenty cities and boroughs, enjoining them to send to parliament, along with the two knights of the shire, *two deputies from each borough within their county*, with authority from their respective communities to consent to what the king and his council should require of them. As the experiment proved

¹ This famous charter has no date. Its substance is given in Norton's Commentaries on the History, Constitution, and Chartered Franchises of the City of London, and its various provisions explained and commented on; book II. chap. II. p. 337. In the latter clause of this charter is an allusion to the very ancient custom of foreign attachment, in which is to be found the germ of all our foreign attachment laws. Pulling's Laws, &c., of London, 188; Hallam's Middle Ages, vol. III. chap. VIII. part III. Mr. Norton gives the substance of all the charters of London from the time of William the Conqueror to the present.

² Hallam's Middle Ages, vol. III. chap. VIII.

successful, and more money was obtained, and with less trouble, than in the former way, the practice was continued. And this, according to the best opinions of learned and careful inquirers,¹ is the origin of popular representation, and of the house of commons itself, the latter constituting, as Macaulay well observes, “the archetype of all the representative assemblies which now meet, either in the old or new world.”² And for this England and the world are in a great measure indebted, as this cursory review shows, to the spirit of independence which animated the towns and cities, and to the pecuniary wants of an enterprising and ambitious monarch.

The political powers thus acquired by towns gave them political importance. This power was courted and controlled by the crown. The king's judges decided that no corporation was valid without the sanction of the king, and most of the corporations from time to time applied to the crown for a grant or confirmation of their privileges. Their dependence upon the crown was thus established, and the crown, as a check upon the nobles, encouraged *popular elections* by the *whole corporate assembly*.³ In the course

¹ Hallam's Middle Ages, vol. III. chap. VIII.; Hume, England, vol. I. App. II.; Dr. Adam Smith's Wealth of Nations, book III. chap. III., whose account of the condition of the towns and boroughs at this period, and the decay of the power of the lords and the growth of the power of the inhabitants of the cities is, though brief, perspicuous and satisfactory; Norton's Com. Lond. 109. A distinctive feature of *boroughs*, in England, is the right of the borough to elect members of parliament. There the term borough includes cities as well as villages, but in the United States the term borough is not in very general use, and, when used, designates an incorporated village or town, but not a city. American Cyclopaedia, vol. III. 536, *Borough*.

² History England, Vol. I. Chap. I.: “The crown! it is the house of commons!” said Mr. Roebuck, in 1858; and the recent history of Great Britain, in several memorable instances, shows that against the declared and positive determination of the commons neither the crown nor the lords, in any struggle relating to popular rights, can make effectual resistance. And so a close observer of our American institutions will discover that both the senate and the executive, on contested questions, ultimately yield to the controlling power and growing importance of the house of representatives.

³ An English Municipal Corporation, as will be explained hereafter, consisted usually of one or more select or definite bodies, and an indefinite body, the latter being generally composed of the burgesses or citizens; and a Corporate Assembly was a meeting of all the bodies and not of the select or definite bodies alone.

of time it was found that these representatives were more formidable to the power of the crown than the nobility had been. In Elizabeth's time compliant judges decided that although the right of election was, by the original constitution or charter, in the whole assembly, still from *usage*, even when within the time of memory, a by-law may be *presumed* giving the right of election to a select class (more readily controlled by the crown) instead of the whole body.'

Afterwards, to increase the power of the crown, James incorporated towns or boroughs, endowing them with the parliamentary franchise, but confining the exercise of the right to vote to select classes. The immense power of popular representation was a most active agency in the overthrow of Charles I., and the temporary subversion of the throne. This power proving inimical to the arbitrary schemes of the Protector, he expelled the members by violence, and subdued their authority in parliament by force. He then secured this power in his own favor by expelling all hostile magistrates and officers and supplanting them with others of his own creation.

On the restoration, Charles II. commenced his reign by reconstructing the corporations and filling them with his own creatures. Judges, also creatures of the king, holding commissions during his pleasure, aided him in his scheme to acquire absolute control over all of the corporations of the realm. London, as the largest and most influential, was selected as an example, and in 1683 the famous *quo warranto* was issued against the city to deprive it of its charter, for two alleged violations, one of which was stale, and both frivolous. Judgment passed, of course, against the city, and its ancient charter was abrogated.' As a condition of its restoration, it was, among other things, provided that thereafter the mayor, sheriff, clerk, etc., should not exercise their office without the king's consent; and that if

¹ Willcock on Municipal Corp. 8; 3 Hallam's Const. History, 52.

² *Rex v. City of London*, Mich. 33 Car. II.; 2 Show. 262; Pulling's Laws, etc. of London, 14. The history of the seizure of the city franchises, by virtue of the writ of *quo warranto* is given at some length by Norton, Com. on the History, etc. of London, book I. chap. XX.: see also *The Case of the City of London*, 8 How. State Trials, 1340, *et seq.*

the king twice disapproved of the officers elected by the corporation, he might himself appoint others. In short, the city was deprived of the right of electing its own officers, and made dependent upon the crown. And such was the fate of most of the considerable corporations in England. The whole power was in the hands of the king.¹

Nor were these arbitrary proceedings confined to England. In 1683 writs of *quo warranto* and *scire facias* were issued for the purpose of abrogating the character of Massachusetts. Patriotism and religion mingled their fervors and combined in its defence, but in vain. Servile judges, in June, 1684, one year and six days after judgment against the city of London, adjudged the charter to be conditionally forfeited; and the charter government was displaced, and popular representation superseded by an arbitrary commission. In 1687, similar writs were issued against the charters of Rhode Island and Connecticut; when, as is well known, the people of the latter colony unsuccessfully endeavored to preserve this cherished muniment of their liberties by concealing it in the charter oak. The colonies, as a result of the English revolution of 1688, had their charters restored. Very shortly after the accession of William and Mary, a bill to restore the rights of those English corporations which had surrendered their charters to the crown during the reigns of James II. and Charles II., was introduced into parliament and became a law, with the general applause of men of all parties.¹

Reference has already been made to the fact that in the time of Elizabeth, the controlling power of corporations was virtually vested in "select bodies." To remedy these and many other abuses, the Municipal Corporations Reform Act (5 and 6 Will. IV. c. 76) was passed. This law sought to restore corporations to their original design, as institutions for the local government of the place, to be controlled by those interested in it, and not by a favored few. It is undoubtedly true, as remarked by Mr. Hallam, that "No

¹ There were eighty-one *quo warranto* informations brought against municipal corporations by Charles II. and James II. 2 Chandl. Com. Debs. 816.

² Macaulay's History of England, vol. III. chap. XV., where a graphic account of the history of its passage is given.

political institution can endure which does not rivet itself to the hearts of men by ancient prejudice or acknowledged interest." That is, it cannot permanently endure, although it may exist long after it ought to cease. If ever an institution outlived its usefulness—lived long after it became a positive evil—it was the municipal corporations of England, prior to the reform act just mentioned, and which became a law as late as 1835. In many important places in England the number of corporators ranged as low as from ten to thirty. In a large majority of the municipalities, the corporations were close; that is, the governing body had the power to determine who should be admitted to freedom or membership; and often the privilege was conferred upon non-residents and the residents excluded. The most important franchise they possessed was that of electing members of parliament, and this, in many places, was the principal function of the corporation. Not only were the councils self-elective, but their tenure was for life. They were frequently controlled by a single party, and all persons entertaining other opinions were of course excluded. The corporations were not in sympathy with, nor did they reflect the wishes of, the people over whom they exercised local jurisdiction. There was no check upon mal-administration. The property was wasted; extravagance characterized the expenditures of money; officers were elected by the irresponsible councils from favoritism or devotion to party.¹ One of the first acts of the Reformed House of Commons was the overthrow, in 1835, of this intolerable system, by the passage of the above-mentioned Municipal Corporations Statute, to which we shall have frequent occasion to refer in the subsequent pages of this work.

Lord Brougham has many titles to the affectionate regard of posterity. Few of his claims are stronger, however, than those which arise from his faithful and effective services in promoting the reform of the Municipal Corporations of Great Britain, by abolishing these self-elected and perpetual councils, and by organizing the corporations upon an uniform model, and by establishing in the act the principle that the councils should be selected for

¹ Glover on Corp. XXXVIII. *et seq.*; Report of Commissioners of Corporate Inquiry, 32, *et seq.*

short and fixed periods by the votes of the burgesses, thus recognizing and adopting the representative system. Mr. Willcock, in concluding his treatise,¹ had recommended a similar reform, but disclaimed being so visionary as to suppose it would soon be effected, since parliament would not willingly relinquish its influence over venal boroughs, and members elected by corporations would not be allowed by their constituents to abandon their ancient though unjust privileges; but within ten years from the time his language was penned, the reform of which he almost despaired was accomplished.

§ 9. In general, all of our American cities, towns, and counties are public corporations, full or *quasi*. They are created by the legislature, and are usually endowed with power to legislate upon, decide, and control local and subordinate matters pertaining to their respective localities. The number and freedom of these local organizations, whereby political power is conferred upon the citizens of the various local subdivisions of a state who have a right to vote and to regulate their own domestic concerns, constitute a marked feature in our free system of government.² In general, each road-district, each school-district, each city and each county is, as to local concerns, self-governed. These organizations are, of course, subject to the legislature of the state, and their acts, so far as they affect private

¹ Willock's Municipal Corp. 513, 514. London, with its "great and notable franchises, liberties, and customs," to treat of which, says Lord Coke (4 Inst. 250), "would require a whole volume of itself," was not embraced in the general act of 5 and 6 Will. 4, chap. 76, but there was subsequently passed an important statute known as the London Corporation Reform Act of 1849. See Supplement to Pulling's Laws, etc., of London.

On the 15th day of August, 1867, after a memorable struggle between the lords and the commons, what is known as the *Disraeli Reform Bill*, became a law, by which the right to vote for members of parliament for boroughs was greatly extended.

² "In all *quasi* corporations, as cities, towns, parishes, school-districts, membership is constituted by living within certain limits." Per *Shaw*, C. J., *Overseers of Poor*, etc. v. *Sears*, 22 Pick. 122, 130.

"When a man," says Mr. Justice *Morton*, *Oakes v. Hill*, 10 Pick. 333, 346, "moves into a town, he becomes a *citizen* thereof (if possessed of the requisite qualifications as to age, etc., and if he remains the requisite length of time) whatever may be the desire of himself or the town."

rights, are also the subjects of judicial cognizance and review. The policy of creating local public and municipal corporations for the management of matters of local concern, runs back to an early period in our colonial history, is exhibited in all our legislation, and expressly or impliedly guaranteed in our state constitutions.¹

The elective franchise in these "local republics" is not, as was the case until recently in England, a privilege dependent upon custom or usage, or confined to certain classes, but is uniform and universal, extending to *all* of the adult male citizens. Old sarums and rotten boroughs, as well as property qualifications, are unknown. The effect of this policy of establishing cities, towns, and districts of country into bodies politic and investing the citizens thereof with the power of self-government, has, upon the whole, been most happy.

It has been noticed by Chancellor Kent,² that one of the most philosophical and fair of foreign observers³ was much

¹Kent Com. 275; Cooley Const. Limit. chap. 8. See also this learned author's recent opinion in the Supreme Court of Michigan, in the *People v. Hurlburt*, 24 Mich. 44, 1871. *State v. Noyes*, 10 Fost. (N. H.) 292; *Bow v. Allenstown*, 34 N. H. 351; *Caldwell v. Justices, etc.*, 4 Jones (Nor. Car.) Eq. 323; *Comw. v. Roxbury*, 9 Gray, 503, 510, 511, note, written by Mr. Gray, now one of the justices of the Supreme Judicial Court of Massachusetts; *Webster v. Hawrington*, 32 Conn. 131. In Mr. Quincy's *Municipal History of Boston*, chap. I. will be found an interesting historical account of the constitution of towns in Massachusetts, and of their mode of organization and operation—particularly of the town of Boston.

²2 Kent Com. 275, note.

³M. De Tocqueville, *Democracy in America*: "Local assemblies of citizens constitute the strength of free nations. Municipal institutions are to liberty what primary schools are to science; they bring it within the people's reach; they teach men how to use and how to enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty." M. De Tocqueville's *Democracy in America*, chap. V.

"From time immemorial," says one of the ablest of American common law judges, "the counties, parishes, towns and territorial subdivisions of the country, have been allowed in England, and, indeed, required, to lay rates on themselves for local purposes. It is most convenient that the local establishments and police should be sustained in that manner; and, indeed, to the interest taken in them by the inhabitants of the particular districts, and the information upon law and public matters generally, thereby diffused through the body of the people, has been attributed by profound thinkers much of that spirit of liberty and capacity for self-government,

struck with the institutions of New England towns; and considered them as small independent republics, in all matters of local concern, and as forming the principle of the life of American liberty existing at this day.

The value of our system of municipal institutions, to which we have thus alluded, may be seen on comparing the political condition of the people of the United States with that of the people of modern France—selected as a fair example of a government without municipal freedom. France is a highly centralized government. The state there is everything; the people, nothing. Municipal institutions, with a democratic element, or with the power of independent local self-government, belong, there, to the past. The central power governs and regulates everything. It provides amusements, constructs roads, bridges, internal improvements, controls trade, inspects manufactures. The effects of this system are thus stated: “Develop in the slightest degree a Frenchman’s mental faculties, and he flies to a town as surely as steel filings fly to a loadstone. From all parts of France men of great energy and resource struggle up and fling themselves on the world of Paris. There they try to become great functionaries. Through every department of the eighty-four, men of less energy and resource struggle up to the provincial capital. All who have, or think they have, heads on their shoulders, struggle into town to fight for office which the government alone can confer. The whole energy and knowledge and resource of the land are barreled

through representatives, which has been so conspicuous in the mother country, and which so eminently distinguishes the people of America. From the foundation of our government, colonial and republican, the necessary sums for local purposes have been raised by the people or authorities at home. Court-houses, prisons, bridges, poor-houses and the like, are thus built and kept up, and the expenses of maintaining the poor, and of prosecutions and jurors, are thus defrayed, and of late (in North Carolina), a portion of the common school fund, and a provision for the indigent insane are thus raised, while the highways are altogether constructed, and repaired by local labor, distributed under the orders of the county magistrates. When, therefore, the constitution vests the legislative power in the General Assembly, it must be understood to mean that power as it had been exercised by our forefathers, before and after their migration to this continent.” Per *Ruffin, J.*, in *Caldwell v. Justices, etc.*, 4 Jones (N. Car.) Eq. 323, 1858.

up in the towns—all between towns is utter intellectual barrenness.”

Such are the withering effects of a centralized despotism.¹ How different with the decentralized system of government in the United States, where each local constituency chooses its own officers—each road-district, school-district, village, town, city, and county administers its own affairs by the people and for the people.*

To civil territorial divisions, erected into corporations with defined powers of local administration, and the exten-

¹ The foregoing was written prior to the dethronement of Napoleon III. and the communist insurrection. The *commune* movement was but the natural result of a popular uprising against centralized power. But it went to the other extreme, and contemplated, *without a national compact*, a league of 36,000 independent *communes*. Their declared scheme was this: “France shall no longer be one and indivisible, empire or republic; she shall form a federation, not of small states or provinces, but of free cities, linked together *only* so far as shall be consistent with the most absolute decentralization and local government.” (*Journal Officiel de la Commune*, April, 1871.) But a scheme which made cities, and not the nation, practically the sovereign, is radically defective, and open to all the objections which M. Mazzini has so forcibly pointed out against it. (Contemporary Review, 1871: reprinted Littell’s Living Age, July, 1871, p. 112.)

* Barrett v. Brooks, 21 Iowa, 144, 151. By constitutional provision in New York, “It belongs, exclusively, to the local power to fill the offices, either by election or appointment, as the legislature may direct.” Met. Bd. Health v. Heister, 37 N. Y. 661, 667. See also constitution of Illinois, art. IX. sec. 5: construed, People v. Chicago, 51 Ill. 17, 1869.

Speaking of the power of creating debts and expending money by the city of Philadelphia, under the Consolidation Act of 1854, in a case where it was held that this power had been invested in the legislative department, and not with subordinate officers, Agnew, J., observed: “It is manifest that the city government is founded, in its leading thought, upon the American idea of a popular representative government, its immediate prototype being the form of the state government. The right of supervision and control is therefore vested in the councils as the immediate representatives of the popular will, which exerts and enforces its determining power by means of constantly recurring elections. Subject to this primary power the affairs of this people, great in numbers, wealth, intelligence, and influence, are conducted by departments and officers.” Philadelphia v. Flanigen, 47 Pa. St. 21, 1864.

“What,” inquired the Abbe Sieyes, in a book which gave a powerful impulse to the public mind at the beginning of the French revolution of 1789—“What is the *tiers etat*?” And he answered, “Nothing.” What ought it to be? “Everything.” Thiers’s French Rev. vol. I. p. 27; Guizot Hist. Civ. Lect. VII. On this popular foundation rests not only our na-

sion of the right to vote for officers, to all who are to be affected by their action, are due that familiarity with public affairs and that love of liberty and regard for private rights and property, which are characteristic of the best government in Europe, Great Britain, and the best in America, the United States.¹

But the picture is not without its shadows. There are evils either inherent in our municipal corporations, or which so generally attend their administration as to favor the notion that they are inherent, which have greatly detracted from their value. Some of these may be briefly indicated: 1. Men the *best fitted* by their intelligence, business experience, capacity, and moral character, for local governors or counsellors, are not always, it is feared it might be added, are not generally, chosen. 2. Those chosen are too apt to merge their *individual conscience* in their corporate capacity. Under the shield of their corporate character men daily do acts which they would never do as individuals.

tional government, but as well all of our state governments and municipal institutions.

¹ After alluding to the antiquity of this system in England, Mr. Justice *Brown*, in the important case of *The People v. Draper* (15 N. Y. 532, 562), says: "Wherever the Anglo-Saxon race have gone, wherever they have carried their language and laws, these communities, each with a local administration of its own selection, have gone with them. It is here that they have acquired the habits of subordination and obedience to the laws, of patient endurance, resolute purpose, and knowledge of civil government, which distinguish them from every other people. Here have been the seats of modern civilization, the nurseries of public spirit, and the centres of constitutional liberty. They are the opposites of those systems which collect all power at a common centre, to be wielded by a common will, and to effect a given purpose, which absorb all political authority, exercise all its functions, distribute all its patronage, repress the public activity, stifle the public voice, and crush out the public liberty." "The city corporations," remarks a modern jurist, "which have grown up in modern times, are of infinite advantage to society; they bind men more closely together than does any other form of political association. But that which most remarkably distinguishes them from the close corporations which formerly existed, is the general spirit of freedom which has been breathed into them. More especially is this the case with town corporations in America, which are as different from those of England as the latter are from similar corporations in Scotland and Holland." Per *Grimké, J.*, *Rosebaugh v. Saffin*, 10 Ohio, 81, 86; see also *State v. Noyes*, 10 Fost. (N. H.) 292.

The public, as if to retaliate, act *towards* corporations in the same spirit. The notion, though not avowed, is by far too much acted upon, that all that can be obtained from a public, or, indeed, from any corporation, is legitimate spoil. Against these, men usually honest and fair in their dealings, do not scruple to make demands which they would never make against an individual.¹ 3. As a result, the administration of the affairs of our municipal corporations is too often both *unwise* and *extravagant*.

Municipal corporations are institutions designed for the local government of towns and cities ; or, more accurately, towns and cities, with their inhabitants, are, for purposes of subordinate local administration, invested with a corporate character. To clothe them with powers to accomplish purposes which can better be left to private enterprise, is unwise. Their chief function should be to regulate and govern. To invest them with the powers of individuals or private corporations, for objects not pertaining to municipal rule, is to pervert the institution from its legitimate ends, and to require of it duties it is not adapted satisfactorily to execute. Some of the evil effects of municipal rule have arisen from legislation unwisely conferring upon municipalities, at the suggestion, often, of interested individuals or corporations, powers foreign to the nature of these institutions, and not necessary to enable them to discharge the appropriate functions and duties of municipal administration. Among the most conspicuous instances of such legislation may be mentioned the power to aid in the building of railways, to incur debts, often without any limit, or any which is effectual, and to issue negotiable securities. The result has too often been that debts are incurred so large that they press with disastrous weight on the municipality and its citizens. Extraordinary and extra-municipal powers have been too often

¹ These effects are not confined to this side of the Atlantic. "It is a familiar fact," says Mr. Herbert Spencer, "that the corporate conscience is ever inferior to the individual conscience—that a body of men will commit, as a joint act, that which every individual of them would shrink from, did he feel personally responsible." Essays, No. VII. p. 261, Am Ed. 1865; and see *ib.* Essays, No. V. for a description—perhaps too highly colored—of the unsatisfactory working of the English reformed municipal corporations.

incautiously or unwisely granted, and the charters or constituent acts carelessly worded and loosely construed. The remedy suggested by experience consists, in part, in constitutional provisions prohibiting the granting of special charters, and requiring all municipal corporations to be organized under general laws. The legislature should also be prohibited from allowing municipal corporations to engage in extra-municipal projects, or to incur debts or levy taxes for such purposes. The powers granted to such corporations, and especially the power to levy taxes, should be more carefully defined and limited, and should embrace such objects only as are necessary for the health, welfare, safety, and convenience of the inhabitants.¹ The amount of indebtedness that may be incurred, even for municipal purposes, should also be limited beyond the power to be evaded.

Experience has also demonstrated the necessity of more power and more responsibility in the executive head of our municipal institutions. Too often the duties of the mayor or executive officer are only nominal, and to these he gives but little attention—a natural result of his want of importance, and of his inability to control the administration of municipal affairs. If the office be clothed with dignity and real authority; if the mayor shall be invested with the veto power; if he shall have the sole right to appoint and

¹ The great increase of corruptions in municipal bodies, growing out of the ability to create, by taxation, a fund which may be squandered, has made many thinking men doubt the wisdom of endowing them with the power;" Mr. Justice *Miller*, in *Rusch v. Des Moines County*, 1 Woolw. C. C. 813, 322, 1868. And note the striking observations of Mr. Justice *Agnew*, on the abuses which attend the administration of finances by municipal bodies and officers, and the too prevalent frauds in the procurement and execution of public contracts; *Philadelphia v. Flanigen*, 47 Pa. St. 21; *Hague v. Philadelphia*, 48 *Ib.* 527. In the case first cited, the suggestion of the text as to the wisdom of strictly guarding and limiting the power to create debts, is well enforced by this learned judge. He truly says: "A *valid* contract is uncontrollable; demanding its performance at the hands of the judiciary, and calling to their aid the whole power of the government. If an appropriation for its payment is not made this year, it must be in the next or some following." The gigantic and astounding frauds and corruption which have been recently revealed (1871) in the local administration of the affairs of the great city of New York have awakened public attention to the necessity of more efficient checks upon the misuse of municipal powers.

the unrestricted power to suspend or remove subordinate officials or heads of departments, then the citizens can justly demand of him that he shall be individually responsible for the proper conduct of the concerns of the municipality, and if grievances exist, they will know to whom to apply for remedy, or upon whom to fix the blame.¹

Municipal corporations, as they exist in this country, it may be further suggested, are of exceedingly complex character. Not here to allude to the legal complexity which arises from their *corporate* nature, we may mention that which arises from the exceedingly diverse character of the

¹ Extended observation of the workings of our municipal institutions has satisfied the author that the views expressed in the text are sound, and he is glad to find them confirmed by the Hon. Josiah Quincy in his "Municipal History of Boston," published in 1852. Mr. Quincy was mayor of the city of Boston from 1823 to 1828, inclusive, and his opinions are entitled to great respect, not only from his known ability, but large experience in municipal affairs. It is interesting to observe the striking coincidence of his views with the recommendations of the "Committee of Seventy," of New York, respecting municipal administration and the importance of efficient executive superintendence, control, and responsibility. Municipal Hist. of Boston, chap. V. And to same effect is Mr. Charles Nordhoff's interesting article in the *North American Review* for October, 1871, entitled, "The Misgovernment of New York,—A Remedy Suggested." This vigorous writer sketches the defects in the ordinary municipal charters with a masterly hand, and shows great familiarity with the subject of which he treats. Many of his suggestions may be profitably studied by the legislator.

In the *Galaxy Magazine* for February, 1872, the article just mentioned is reviewed by Mr. Isaac Butts, who contends that the only efficient cure for municipal evils is to assimilate local government to that of private corporations, giving the real and ultimate control of all municipal affairs except education and the support of the poor, to the *property* interests of the municipality. He maintains that a "municipality is essentially a moneyed corporation rather than a political community or a diminutive state." He insists that "the basis of municipal authority should be changed in something like the manner following: 1st. Let every person cast one vote, as at present. 2d. In addition to the above, let every person, corporation, and firm, without regard to residence or sex, cast one vote, in person or by proxy, for every \$——— for which they respectively were assessed on the last general assessment roll of the city. 3d. A plurality of the aggregate vote to elect."

It may be observed, that in England, under the reformed municipal system, the right to a voice in municipal management is restricted to occupiers of houses and tax-payers, and yet we have, as we have seen, complaints of municipal extravagance, corruption, and abuse.

multiform duties which are confided to their agency and management, requiring the delegation of corresponding powers and provisions for their execution. Some of these powers are civil or political, and not peculiar to the people of the municipality ; others are purely local, of which some concern all the inhabitants and some affect only, or mainly, the property owners, on whom, exclusively, the burden of their exercise, or administration, falls. In the ordinary municipal charters, the essential differences between these powers have not been regarded, and, in consequence, *adequate* checks upon their abuse have not been provided.

The *general* right of suffrage will remain, and, in the author's judgment, ought to remain as extensive in the municipality as in the state, and all schemes of municipal reform based upon restricting it are simply impracticable. But if special or extra-municipal powers be granted, not affecting civil, political, or other rights which concern all, but which involve directly the expenditure and payment of money, it is but just that the project should be required to have the support of a majority of those who must pay the expense.

No small proportion of corruption and abuse in municipalities has had its source in their authority to make public and local improvements. The power is usually conferred without sufficient care, and the rights of the property owners (often made liable for the whole cost of the improvement or amount of the expenditure) not sufficiently respected and guarded.

As it is the part of wisdom to organize municipal corporations under *general* laws, so that defects and abuses, being generally seen and felt, will be the more speedily and better remedied by the legislature, so municipal corporations should be shorn of the power to grant special privileges, except under ordinances, general in their character, and which, on equal or fair terms, will make them available to all.

The courts, too, have duties, the most important of which is to require these corporations, in all cases, to show a plain and clear grant for the authority they assume to exercise ; *to lean against constructive powers*, and, with firm hands, to hold them and their officers within chartered limits.

But with all the drawbacks we have mentioned (many of

which are remediable) our system of popular municipal organization and administration is, beyond controversy, the fairest to the individual citizen, and, on the whole, the most satisfactory in its operations and results of any that has yet been devised. Any other conclusion would be equivalent to admitting that the people are incapable of enlightened self-government; that holders of property ought alone to be respected, and alone be endowed with political and municipal rights; that the few should govern the many, and that our representative system, the flower of modern civilization, based upon the equal right of every man to a voice in the local and general government, is a failure. It is not improbable that we sometimes over-estimate the shortcomings in the practical workings of our municipal system, for the system is an open one, in which all are interested to bring its abuses into the light of day. The fine observation of Lord Bacon fitly applies: "*The best governments are always subject to be like the fairest crystals, wherein every icicle or grain is seen, which in a fouler stone is never perceived.*"

CHAPTER II.

CORPORATIONS DEFINED AND CLASSIFIED.

§ 9a. A *corporation* is a legal institution, devised to confer upon the individuals of which it is composed powers, privileges, and immunities which they would not otherwise possess, the most important of which are continuous legal identity and perpetual or indefinite succession, under the corporate name, notwithstanding successive changes, by death or otherwise, in the corporators or members of the corporation. It conveys, perhaps, as intelligible an idea as can be given by a brief definition to say, that a corporation is a *legal person*, with a special name, and composed of such members, and endowed with such powers, and such only, as the law prescribes. The most accurate notions of complex subjects come not from definition, but description; and in the course of the present work we shall describe the class of corporations with which it deals, by their creation, constitution, faculties, powers, duties, liabilities, and purposes. Some of the definitions and deductions in the earlier reports amuse by their quaintness, but are without much practical value. "As touching corporations," says Lord Coke, "the opinion of Manwood, chief baron, was this: that they were invisible, immortal, having no conscience or soul; and, therefore, no subpœna lieth against them; they cannot speak, nor appear in person, but by attorney."¹

Chief Justice *Marshall's* description of a corporation is remarkable for its general accuracy and felicitous expression: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed to be best calculated to effect the

¹ 2 Bulst. 238; Willc. Corp. 15.

object for which it is created. Among the most important are *immortality* [in the legal sense that it may be made *capable* of indefinite duration], and, if the expression may be allowed, *individuality*—properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacy, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object like one immortal being.” Thus, though the members change, the corporation itself remains, in its legal personality, the same, all of its members, past and present, constituting, in law, but one person, in the same manner as the Thames, or the Mississippi, is still the same river, though the parts composing it are constantly changing.¹ The above observations are, in general, applicable to all corporations, private as well as public and municipal.

§ 9b. *Municipal corporations* are bodies politic and corporate of the general character above described, established by law, to share in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated.²

¹ Dartmouth College v. Woodward, 4 Wheat. 636, 1819. Other definitions: 4 Black. Com. 37; 1 Kyd Corp. 13; Grant Corp. 3, 4; Angell & Am. Corp. sec. 1; Glover Corp. 3, 6. Willcock declines to define, but describes corporations: Munic. Corp. 15. The last author observes that “A corporation continues the same body politic from its creation to its dissolution, unaltered by the revolution of ages or the successive changes of its members, so that it is unnecessary to make grants to them and their successors, or to declare their obligations binding on their successors.” *Ib.* 16; Glover, 8; Grant, 5; 7 Vin. Abr. 358, 363.

² Glover, 8; 1 Black. Com. 468.

³ “A body politic,” says Lord Coke, “is a body to take in succession, framed as to its capacity by policy, and therefore is called by Littleton (sec. 413) *a body politic*; it is called a *corporation*, or *body corporate*, because the persons are made into a body, and are of capacity to take, grant, &c., by a particular name. Viner’s Abr. Corp.(a 2). A *municipal corporation* is also

Like other corporations, they must be created by statute. They possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them, or other statutes applicable to them. Persons residing in or inhabiting a place to be incorporated, as well as the place itself, are—both *the persons* and *the place*—indispensable to the constitution of a municipal corporation. Artificial succession, also, is of the essence of such a corporation. Municipal corporations are created and exist for the public advantage, and not for the benefit of their officers or of particular individuals or classes. The corporation is the artificial body created by the law, and not the officers, since these are, from the lowest up to the councilmen or mayor, the mere ministers of the corporation. Even the council, or other legislative or governing body, constitutes, as it has been well remarked, neither *the* corporation, nor in themselves *a* corporation.¹ It is quite impossible, in any brief space, to convey an adequate idea of the exact nature and properties of a municipal corporation. There is nothing in the law more complex and abstruse. Although the inhabitants of a place be incorporated, they do not constitute the corporation; neither, as we have just observed, is it constituted by the governing body. Notwithstanding Mr. Kyd's criticism, the corporation is *invisible*, for, although we may see all the inhabitants, or all of the officers, we do not see the legal body which makes the corporation as we see an army; but this is a property common to all corporations. An additional complexity in municipal corporations arises out of the various and diverse powers usually conferred, giving them an extremely composite character. The primary and fundamental idea of a municipal corporation is an agency to regulate and administer the internal concerns of a locality in matters peculiar

defined to be "An investing the people of a place with the local government thereof." Salk. 183. "This latter description," says Mr. Justice *Nelson*, in the *People v. Morris*, 18 Wend. 825, 834, 1835, "is the most appropriate, and is justified by the history of these institutions, and the nature of the powers with which they were, and are, invested." It is also quoted by *Campbell*, C. J., in the *People v. Hurlburt*, 24 Mich. 44, 1871.

¹ Reg. v. Paramore, 10 Ad. & El. 286; Reg. v. York, 2 Q. B. 850; Grant, 857; Glover, 4; Harrison v. Williams, 8 Barn. & Cress. 162.

to the place incorporated, and not common to the state or people at large ; but it is the constant practice of the states to make use of the incorporated instrumentality, or of its officers, to exercise powers, perform duties, and execute functions not strictly or properly local or municipal in their nature, but which are, in fact, state powers, exercised by local officers, within defined territorial limits ; and it is important, as we shall hereafter see, to keep this distinction in mind. In theory, the two classes of powers are distinct ; but the line which separates the one from the other is often very difficult to trace. The point may be illustrated from the English law : If the king incorporate a town, its officers will have no implied power as conservators or justices of the peace ; express words are necessary to confer this power, and when they act in the latter capacity, it is not because they are corporate officers, but because of powers expressly annexed to their corporate offices, and the two capacities remain distinct, although united in the same person.¹ The subject itself will be elsewhere discussed. The *name* of the municipal corporation, its *boundaries*, its *officers*, its *powers*, its *duties*, and the like, are subjects regulated by legislative enactment, and will be hereafter noticed.

§ 10. Corporations intended to assist in the conduct of local civil government are sometimes styled *political*, sometimes *public*, sometimes *civil*, and sometimes *municipal*, and certain kinds of them with very restricted powers—*quasi* corporations—all these by way of distinction from *private* corporations. All corporations intended as agencies in the administration of civil government, are *public*, as distinguished from *private* corporations. Thus an incorporated school-district, or county, as well as city, is a public corporation ; but the school-district or county, properly speaking, is not, while the city is, a *municipal* corporation. All municipal corporations are public bodies, created for civil or political purposes ; but all civil, political or public corporations are not, in the proper use of language, municipal corporations. The phrase Municipal Corporations, in the

¹ 1 Kyd, 827 ; People v. Hurlburt, 24 Mich. 44, 1871, per Campbell, C. J. S. C., 6 Am. Law Rev. 376.

contemplation of this treatise, has reference to *incorporated villages, towns and cities*, as distinguished from other public corporations, such as counties and *quasi* corporations.¹

¹ *Hamilton Co. v. Mighels*, 7 Ohio St. 109, 1857.

The distinction, as it is usually drawn between *municipal corporations* proper, such as chartered towns and cities, or towns and cities voluntarily organized under general incorporating acts, such as exist in a number of the states, and *involuntary quasi corporations*, such as counties, is clearly set forth in the carefully prepared opinion of *Brinkerhoff*, J., delivering the judgment of the Supreme Court of Ohio in the case just cited. "Municipal corporations proper" he observes, "are called into existence, either at the direct solicitation or by the free consent of the persons composing them, for the promotion of their own local and private advantage and convenience." On the other hand, "Counties are at most but local organizations, which, for the purposes of civil administration, are invested with a few functions characteristic of a corporate existence. They are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former (municipal) organization is asked for, or at least assented to, by the people it embraces; the latter organization (counties) is superimposed by a sovereign and paramount authority.

A *municipal corporation proper* is created mainly for the interest, advantage, and convenience of the locality and its people; a *county organization* is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are in fact, but a branch of the general administration of that policy." The learned judge, adverting to the case in hand, in which it was sought to make the county liable in damages to one who suffered a personal injury from the neglect of the commissioners of the county in the discharge of their official duties, says: "But, it is said, the members of the board of county commissioners are chosen by the electors of the county, and hence the board is to be regarded as the *agents of the county*, for whose torts, in the performance of official duties, the county ought to be responsible. True, the people of the county elect the board of county commissioners; but they also elect the sheriff and treasurer of the county. Are the people of the county, therefore, responsible for the malfeasances in office of the sheriff or for the official defalcations of the county treasurer? This will not be pretended. * * * * We cannot but think that county commissioners are not agents or representatives of the county in any such sense or manner as to render the people of the county justly answerable for their neglect; even if

§ 10a. Civil corporations are of different *grades or classes*, but in essence and nature they must all be regarded as public. The school-district or the road-district is invested with a corporate character the better to perform within and for the locality its special function, which is indicated by its name. It is but an instrumentality of the state, and the state incorporates it that it may the more effectually discharge its appointed duty. So with counties. They are involuntary, political, or civil divisions of the state, created by general laws to aid in the administration of government. Their powers are not

the neglect be such as would create a civil liability against a natural person or a municipal or private corporation." "It is," he adds, "undoubtedly competent for the legislature to make the people of a county liable for the official delinquencies of the county commissioners; but this has not yet been done, and we think such liability cannot be derived from the relations of the parties, either on the principles or the precedents of the common law." Followed, *Jacobs v. Hamilton Co.*, 4 Fisher Pat. Cases, 81, 1862. See also *Soper v. Henry Co.*, 26 Iowa, 264, 1868; *Treadwell v. Commissioners*, 11 Ohio St. 190; *Angell & Ames*, secs. 14, 23, 24, 25. *Post*, secs. 32, 39, 761, 762.

Speaking of the powers of *school-districts* and their officers, *Bell, J.*, in *Harris v. School District*, 8 Foster, N. H. 58, 61, 1853, observes: "These little corporations have sprung into existence within a few years, and their corporate powers and those of their officers are to be settled by the constructions of the courts upon a succession of crude, unconnected, and often experimental, enactments." "School-districts," he further remarks—referring to those in New Hampshire—"are *quasi* corporations of the most limited powers known to the laws. They have no powers derived from usage. They have the powers expressly granted to them, and such implied powers as are necessary to enable them to perform their duties, and no more. Among them is the power to vote money for specified purposes, and the power to appoint committees 'to carry their votes' relative to those purposes 'into effect.' The district may clearly, by their votes for building and repairing school-houses, limit the expense to a definite sum; and they may limit the precise repairs or the exact description of the school-house to be built, and when this is done the *committees* (appointed to 'carry the votes into effect') cannot bind the district by exceeding those limits. These committees are special agents without any general powers over the affairs of the district, and their powers are confined to a special purpose; and no inference can be drawn from the general nature of their powers. The liability of such powers to abuse, furnishes the strongest arguments against their existence," as a committee might load the district with debts, though the district had expressly limited their authority. See also *Wilson v. School Dist.*, 32 N. H. 118, 1855; *Foster v. Lane*, 10 Foster, 805, 815; *Giles v. School Dist.*, 11 Fost. 804. *Scales v. Chattahoochee County*, 31 Geo. 225, 1870.

uniform in all the states, but these generally relate to the administration of justice, the support of the poor, the establishment and repair of highways, all of which are matters of state, as distinguished from local concern. They are purely auxiliaries of the state ; and to the general statutes of the state they owe their creation, and the statutes confer upon them all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject. Considered with respect to the limited number of their corporate powers, the bodies above named rank low down in the scale or grade of corporate existence ; and hence have been frequently termed *quasi* corporations. This designation distinguishes them on the one hand from private corporations aggregate, and on the other from municipal corporations proper, such as cities or towns acting under charters, or incorporating statutes, and which are invested with more powers and endowed with more functions and a larger measure of corporate life. It will appear hereafter that many of the courts have drawn a marked line of distinction between municipal corporations and *quasi* corporations, in respect to their liability to persons injured by their neglect of duty ; holding the former liable, without an express statute giving the action, in cases in which the latter are not considered liable unless made so by express legislative enactment. One reason often given for the distinction is, that with respect to local or municipal powers proper (as distinguished from those conferred upon the municipality as a mere agent of the state) the inhabitants are to be regarded as having been clothed with them at their request and for their peculiar and special advantage, and that as to such powers and the duties springing out of them, the corporation has a *private* character, and is liable, on the same principles and to the same extent as a private corporation. This subject will be fully examined in its appropriate place, and is only alluded to here for the purpose of noting the distinction which has been made between municipal and other public corporations. But that a municipal corporation is in any just view a *private* corporation, or possesses a double character, the one private and the other public, although often asserted, is only true, if true at all, in a very modified, if not inaccurate, sense. In their nature

and purposes, municipal corporations, however numerous and complex their powers and functions, are essentially public.

§ 11. *The New England Town.*—In the New England states, public corporations have, in many respects, a peculiar character. In some instances, there are acts incorporating *cities*, giving them defined powers and providing a special mode of government; but even then the general laws in relation to *towns*, when not inconsistent with the provisions of the local act, ordinarily apply to the places specially incorporated. In the New England *town* proper, the citizens administer the general affairs in person, at the stated corporate or town meetings, and through officers elected by themselves.¹ The towns are charged with the support of schools, the relief of the poor, the laying out and repair of highways, and are empowered to preserve peace and good order, maintain internal police, and direct and manage generally, in a manner not repugnant to the laws of the state, their prudential affairs; and for defraying these and all necessary and lawful charges, they may levy and collect taxes. Speaking generally, the New England towns are organized after the same model; and an exact notion of their character will be best obtained by reference to the leading statutory provisions in Massachusetts respecting them, given in the note.² The town in New England, while

¹ In *towns*, according to the use of the word in the New England states and some of the others, the citizens administer the general affairs in person, in town meetings. In *cities*, this is done by means of a mayor, aldermen, and council, to whom the citizens entrust most of the legislative and executive powers of the place. *State v. Glennon*, 8 Rh. Is. 276, 278 *per Staples*, C. J. In New England, "town" is a generic term, and it will embrace *cities*, unless the contrary appears in other parts of the statute to have been the intent of the legislature. *Ib.*

² Summary of the leading statutory provisions in *Massachusetts* respecting towns:

1. *As to powers and duties.*—They are "*bodies corporate*, with all the powers heretofore exercised by them, and subject to all the duties to which they have heretofore been subject." Genl. St. 1860, ch. XVIII. sec. 1. "Towns may, in their corporate capacity, sue and be sued in the name of the town." *Ib.* sec. 8. They may hold real estate and personal property "for the public use of the inhabitants," and also "in trust for the support

somewhat anomalous, has some of the usual powers of a regular municipal corporation, and some of the characteristics of the county organizations in many of the states. The New England *town* affords, perhaps, an example of as pure a democracy as anywhere exists. All of the qualified inhabitants meet and directly act upon and manage, or direct the management of, their own local concerns. This form of government was adopted at a very early period, and is firmly adhered to and deeply cherished by the people of the New England states. The result has demonstrated how well adapted it is to promote the well-being of the communities that for so long a space of time have thus governed themselves. The remarkable growth and prosperity of the New England states, not the most favored by nature, and the intelligence and character of the people, are facts known to all; and it is not strange that these results should be attrib-

of schools and the promotion of education within the limits of the town."

Ib. sec. 9. They may make *contracts* necessary and convenient for the exercise of their corporate powers," and may dispose of their *corporate property*. *Ib.* secs. 8, 9. "They may, at legal meetings, grant and vote such sums as they judge necessary, for the following purposes: For the support of town *schools*; for the relief, &c., and employment of the *poor*; for the laying out and discontinuing and repair of *highways*; for procuring the writing and publishing of *town histories*; for *burial grounds*; for encouraging the destruction of *noxious animals*; for all other *necessary charges* arising therein." *Ib.* sec. 10. "May make necessary *by-laws*, not repugnant to the laws of the state, for directing and managing the prudential affairs, preserving the peace and good order, and maintaining the internal police thereof." *Ib.* sec. 11. But such by-laws must, before taking effect, be approved by the Superior Court, or, in vacation, a judge thereof. *Ib.* sec. 14. They are binding upon all within the limits of the town, strangers as well as inhabitants. *Ib.* sec. 15.

2. *Corporate or Town Meetings*.—"Every male citizen of twenty-one years of age and upwards (except paupers, &c.), who has resided within the state one year, and within the town in which he claims the *right to vote*, six months, and who has paid a state or county tax, &c., shall have a right to vote upon all questions at all meetings for the transaction of town affairs, and no other person shall be entitled to vote." *Ib.* sec. 19. "The annual meeting of each town shall be held in February, March, or April; and other meetings at such time as the selectmen may order." *Ib.* sec. 20. Warrants issue for all meetings, under the hands of the selectmen, directed to constables or others, who notify such meeting in the manner prescribed by the by-laws or vote of the town. *Ib.* sec. 21. "The warrant shall express the *time and place* of the meeting, and the *subjects* to be there acted upon;" * * * "and nothing acted upon shall have a legal operation

uted in a large measure, to this system of local popular government. But, in the course of time, many of the towns, or portions thereof, grew to be large and populous, and the system of meetings of the electors, in their original capacity, became inconvenient and almost impracticable. When the population of a town or place exceeds 10,000 or 12,000 persons, the need for the representative system is urgently felt. Accordingly, in the New England states, there are now, in addition to towns, a large number of incorporated *cities*, with charters or constituent statutes, organized upon the usual representative model, with a legislative or governing body, and an executive head and subordinate officers. The people of the large city of Boston, in particular, were wedded to the town system, and struggled long against the change to the representative plan; and five successive times between

unless the subject matter thereof is contained in the warrant." *Ib.* sec. 22. If selectmen unreasonably refuse to call a meeting, any justice of the peace may do so upon the application of ten or more legal voters of the town. *Ib.* sec. 23. Provision is made for moderating and conducting the meeting. *Ib.* secs. 25-30. *Town officers* are elected at the annual meeting, who serve for one year, and until others are chosen and qualified. These consist of selectmen, assessors, treasurer, constables, who are *ex-officio* collectors unless others be specially chosen; field drivers, fence viewers, surveyors of lumber, measurers of wood, unless selectmen appoint, "and all other usual town officers." *Ib.* sec. 31. Then follows a variety of provisions respecting the duties of these several officers, and the manner of their performance. In addition, there are acts incorporating and establishing cities. "The laws in relation to towns, where not inconsistent with the general or special provisions of the acts establishing cities, apply to them; and cities are subject to the liabilities, and city councils have the powers of towns. The mayor and aldermen shall have the powers and be subject to the liabilities of selectmen, &c., if no other provisions are made in relation thereto." General St. 1860, ch. XIX. 166. "The marked and characteristic distinction between a *town* organization (in Massachusetts) and that of a *city* is, that in the former all of the qualified inhabitants meet, deliberate, act, and vote in their natural and personal capacities; whereas, under a city government, this is all done by their representatives." *Per Shaw, C. J.*, in *Warren v. Charlestown*, 2 Gray, 84, 101. As to the *origin and power* of towns in Massachusetts, consult *Commonwealth v. Roxbury*, 9 Gray, 451, 1857, opinion of *Shaw, C. J.*, 476, and the valuable note of Mr. (since Judge) Gray, pp. 508, 528; Quincy's *Munic. Hist. of Boston*, ch. I.; *ante*, chapter I. Towns were not expressly authorized *to sue* and be sued until 1694, nor formally incorporated until 1785. *Ib.* 9 Gray, 511, note "G;" 2 Dane's Ab. 698; *Willard v. Newburyport*, 12 Pick. 227, 231; *Spaulding v. Lowell*, 23 Pick. 77, 78. *Post*, sec. 127, note.

1784 and 1821 rejected well-considered schemes for a city government. The town continued to be governed by meetings of the electors *en masse*, acting through boards and officers, until the place had forty thousand inhabitants, of whom *seven* thousand were qualified voters. In 1822, however, the legislature, at the desire of a majority of the voters, granted the place a city charter, by which it was provided that the control of its affairs should be in a mayor and city council. After this, other towns, from time to time, made the change from the town to the city plan; so that, as before observed, we have in the New England states both modes of local administration. The town system is the general one; the city, or representative system, is the exceptional one, and is confined to places of compact population and considerable size.¹

¹ No city was incorporated in Massachusetts until after the amendment of the constitution of that state in 1820. *Per Shaw, C. J., in Warren v. Charlestown*, 2 Gray, 84. After referring to the previous attempts in 1784, 1785, 1791, 1804, and 1815, to change the town government of Boston, Mr. Josiah Quincy, in his *Municipal History of Boston*, p. 28, continues: "In 1821, the impracticability of conducting the municipal interests of the place, under the form of town government, became apparent to the inhabitants. With a population upwards of forty thousand, and with seven thousand qualified voters, it was evidently impossible calmly to deliberate and act. When a town meeting was held on any exciting subject, in Faneuil Hall, those only who obtained places near the moderator could even hear the discussion. A few busy or interested individuals easily obtained the management of the most important affairs; in an assembly in which the greater number could have neither voice nor hearing. When the subject was not generally exciting, town meetings were usually composed of the selectmen, the town officers, and thirty or forty inhabitants. Those who thus came were, for the most part, drawn to it from some official duty or private interest, which, when performed or obtained, they generally troubled themselves but little, or not at all, about the other business of the meeting. In assemblies thus composed, by-laws were passed, taxes, to the amount of one hundred or one hundred and fifty thousand dollars, voted, on statements often general in their nature, and on reports, as it respects the majority of voters present, taken upon trust, and which no one had carefully considered except, perhaps, the chairman. In the constitution of the town government there had resulted, in the course of time, from exigency or necessity, a complexity little adapted to produce harmony in action, and an irresponsibility irreconcilable with a wise and efficient conduct of its affairs. On the agents of the town there was no direct check or control; no pledge for fidelity but their own honor and sense of character. The prosperity of the town of Boston, under such a form of government;

§ 12. The *character of towns* in New England, and in what respects they differ from English Municipal Cor-

the few defalcations which had occurred; the frequent, and often, for years, uninterrupted, re-election of the same members to the officiating boards, are conclusive evidence of the prevailing high state of morals and intelligence among the inhabitants." After mentioning the different boards among which the executive power was divided, and which acted independently of each other, and which were invested with the expending power, and, in effect, with exercise of the whole power of taxation, Mr. Quincy proceeds: "A conviction of the want of safety and of responsibility in a machine thus complicated and loosely combined, became, at length, so general that the inherited and inveterate antipathy to a city organization began perceptibly to diminish. About this time, also, one of the most common and formal objections to a city organization was removed. The constitution of Massachusetts, which was passed in 1780, contained no express authority to establish a city organization; and, in every attempt to change that of the town, it never failed to be zealously contended that the legislature of the commonwealth possessed no such power. But by the amendments to the constitution, made by the convention of 1820, and adopted by the people, this power was expressly recognized. The question, therefore, now stood on its own merits, and independent of constitutional objections. The debates, also, which occurred in this convention, had a tendency to open the eyes of the inhabitants to their own interests, and to allay some of the long-cherished prejudices against a city organization." In 1821 the people voted to make the change, and measures were immediately taken to obtain the sanction of the legislature. The legislature, on the 23d day of February, 1822, passed "An act establishing the city of Boston," commonly called "the city charter." The following is a brief outline of the principal features of this charter, taken from Quincy's *Municipal History of Boston*, p. 41: . . . 1. The title of the corporation to be, "The City of Boston." 2. The control of all its concerns is vested in a mayor, a board of aldermen, consisting of eight, and common council, of forty-eight inhabitants, to be called, when conjoined, "The City Council." 3. The city to be divided into twelve wards. The mayor and aldermen and common council to be chosen annually, by ballot, by and from inhabitants; four of the common council from and by those of each of the wards 4. The city clerk to be chosen by the city council. 5. The mayor to receive a salary. His duty, to be vigilant and active in causing the laws to be executed; to inspect the conduct of all subordinate officers; to cause carelessness, negligence, and positive violation of the laws to be prosecuted and punished; to summon meetings of either or both boards; to communicate and recommend measures for the improvement of the finances, the police, health, security, cleanliness, comfort, and ornament of the city. 6. The mayor and aldermen are vested with the administration of the police and executive power of the corporation generally, and with specific enumerated powers. 7. All other powers belonging to the corporation are vested in the mayor, aldermen, and common council, to be exercised by concurrent vote. *Post*, sec. 127, note.

porations, existing by prescription or special charter, prior to the legislation by parliament in 1835, before mentioned,¹ and the care to be observed in applying the English cases relating to such corporations to municipal corporations in this country, are well set forth by the learned Chief Justice *Perley*, in delivering the opinion of the Supreme Court of New Hampshire, in an important case to which we shall again have occasion to allude.² He says: "It is to be observed that municipal corporations in England are broadly distinguished in many important respects from towns in this and the other New England states. There is no uniformity in the powers and duties of English municipal corporations. They were not created and established under any general public law, but the powers and duties of each municipality depended upon its own individual grant or prescription. Their corporate franchises were held of the crown by the tenure of performing the conditions upon which they had been granted, and were liable to forfeiture for breach of the conditions. They indeed answered certain public purposes, as private corporations do which have public duties to perform, and some of them exercised political rights. But they are not like towns (with us) general, political and territorial divisions of the country, with uniform powers and duties, defined and varied, from time to time, by general legislation. Towns (in New England) do not hold their powers ordinarily under any grant from the government to the individual corporation; or by virtue of any contract with the government, or upon any condition, express or implied. They give no assent in their corporate capacity to the laws which impose their public duties or fix their territorial limits." And referring to the case then before the court, he added: "In all that is material to the present inquiry, municipal corporations in England bear much less resemblance to towns in this country than to private corporations which are charged with the performance of public duties, and for these reasons the English authorities on the subject are but remotely applicable to the present case."

¹ *Ante*, chap. I.; *post*, chap. III.

² *Eastman v. Meredith*, 36 N. H. 284, 290, 1858.

§ 12. The *distinctive character* of the New England towns, and particularly the limited nature of their powers, will be further seen by a brief glance at the course of judicial decisions with respect to their authority to make contracts and to obtain revenue. Money can only be raised by them for the purposes expressed in the statute, and for expenses incident to such purposes. The power of the majority is wisely limited by law to the object and cases which are clearly provided for and defined by statute.¹

¹ *Stetson v. Kempton*, 13 Mass. 272, 1816; *Parsons v. Goshen*, 11 Pick. 396, 1831. "This limitation," says Mr. Justice *Wilde*, with great truth, in the case last cited, "upon the power and authority of towns to enter into contracts and stipulations, is a wise and salutary provision of law, not only as it protects the rights and interests of the minority of the legal voters, but as it may not unfrequently prove beneficial to the interests of the majority, who may be hurried into rash and unprofitable speculations by some popular or delusive excitement, to the influence of which even wise and considerate men are sometimes liable. A town in its corporate capacity will not be bound, even by the express vote of the majority, to the performance of contracts or other legal duties, not coming within the scope of the objects and purposes for which they are incorporated." *Anthony v. Adams*, 1 Met. 284, 286, 1840, *per Shaw*, C. J.; quoted and followed in *Vincent v. Nantucket*, 12 Cush. 105, 1853. See also *Norton v. Mansfield*, 16 Mass. 48; *Dill v. Wareham*, 7 Met. 438, 1844 (contract by the town, undertaking to transfer the right of taking oysters within its limits).

Whether towns in *Massachusetts* are authorized under the statute to make any contract for the payment of money, which they are not authorized to raise money to discharge by a tax on the inhabitants, does not seem to be settled by express adjudication. *Bancroft v. Lynnfield*, 18 Pick. 566, 1836, *per Shaw*, C. J.; *Tash v. Adams*, 10 Cush. 552, 1852.

"The inhabitants of every town in this state"—Maine—says *Shepley*, C. J., in *Hooper v. Emery*, 14 Maine (2 Shep.) 375, 1837; "are declared to be a body politic and corporate by the statute: but these corporations derive none of their powers from, nor are any duties imposed upon them by, the common law. They have been denominated *quasi* corporations, and their whole capacities, powers and duties are derived from legislative enactments." See also *Pittson v. Clark*, 15 Maine, 460, 463; *Augusta v. Leadbetter*, 16 Maine, 45, 1839; *Estes v. School Dist.*, 33 Maine, 170, 1871; *Mitchell v. Rockland*, 45 Maine, 496, 504, 1858; *Salem Mill Dam v. Ropes*, 6 Pick. 23, 32; *School Dist. etc. v. Wood*, 13 Mass. 193, 1816, *per Parker*, C. J.; *Mower v. Leicester*, 9 Mass. 247, 250, 1812.

Where the legislature has prescribed the purposes for which money may be raised by taxation, it cannot be raised for other and distinct purposes. Nor when it is raised and collected for authorized and proper purposes can it be appropriated to, or expended upon other and different, objects. This would be to break down and defeat the limitation. Hence towns cannot

Thus a town, under a statute which restricts them to raising money to provide for "the poor, for schools, for the support of public worship, and other *necessary* charges," cannot raise money, even in the time of war, and when the town is in immediate danger from the enemy, for the payment of additional wages to the drafted and enlisted militia, and for other purposes of defence. This is not a *corporate* duty, but the duty of the general government.¹ Nor can it appropriate money, contract for, or levy a tax to aid in the construction of a road, which, by law, is to be made at the expense of the *county*, and not the town.² A town may, it is said, raise money to meet ordinary expenditures, such as the payment of officers, the support and defence of actions,

give away or distribute, *per capita* or otherwise, money collected by taxation. Hooper v. Emery, 14 Maine (2 Shep.) 375, explaining Ford v. Clough, 8 Greenl. 334; Davis v. Bath, 17 Maine, 141, 1840; Pease v. Cornish, 19 Maine (1 Appl.) 191, 1841; Stetson v. Kempton, 13 Mass. 272; Dillingham v. Snow, 5 Mass. 547; Spaulding v. Lowell, 23 Pick. 71, 1830; Woodbury v. Hamilton, 6 Pick. 101; Cooley v. Granville, 10 Cush. 56.

The *Vermont* statute respecting the powers of towns is nearly a transcript of that of Massachusetts. The Supreme Court of Vermont approves of the exposition of the statute given by the Supreme Court of Massachusetts in Willard v. Newburyport, 12 Pick. 230; Allen v. Taunton, 19 Pick. 485; Torry v. Milbury, 21 Pick. 64; Spaulding v. Lowell, 23 Pick. 71; Hardy v. Waltham, 3 Met. 163, *per* Isham, J., in Van Sicklen v. Burlington, 27 Verm. (1 Wms.) 70. For discussion of powers and duties of *selectmen*, and digest of previous decisions in *New Hampshire*, see Carleton v. Bath, 2 Fost. (N. H.) 559. Have no *general* authority to bind the town by contract. Andover v. Grafton, 7 N. H. 300. But are confined to such acts as are necessary to the discharge of their duties. Sanborn v. Deerfield, 2 N. H. 253. Cannot, *ex-officio*, adjust controversies or suits, or release a cause of action. Carlton v. Bath, 2 Foster, 559. May indemnify town officers in proper cases. 12 N. H. 278. But there is no promise *implied* in law against a town to indemnify selectmen in any case, for damages which they have been compelled to pay, arising out of the discharge of official duty. 35 N. H. 189. Are supposed to be liable to the corporation for gross neglect of official duty. Sanborn v. Deerfield, 2 N. H. 253, by Woodbury, J.

¹ Stetson v. Kempton, 13 Mass. 272, 1816, where the phrase, *necessary town charges*, is construed by Parker, C. J.; and see comment of Shaw, C. J., 12 Pick. 227, 230, and 23 Pick. 74; and of Dewey, J., in Allen v. Taunton, 19 Pick. 485, 487; 18 *Ib.* 566, 10 Cush. 57; of Clifford, J., in Burrill v. Boston, 2 Clifford Cir. C. 590, 1867.

² Parsons v. Goshen, 11 Pick. 396, 1831; Anthony v. Adams, 1 Met. 284, 1840.

the expenses incident to discharging duties imposed by law, looking to the safety and convenience of the citizens. Thus it can erect a town or city hall, or market house, but not a theatre, a circus, or any place of mere amusement, nor even a statue or monument, unless in populous and wealthy towns, as suitable ornaments to public buildings or squares.¹ So towns may provide for the support of a public clock, hay scales, burying ground, wells, reservoirs, and many other like objects which relate to the accommodation and convenience of the inhabitants, and which have been placed under the municipal jurisdiction of towns by statute or by usage.²

§ 14. Although not styled such, *each one of the United States*, in its organized political capacity, is in effect a public corporation. Corporations, however, as the term is commonly used, does not include states, but only derivative creations, owing their existence and powers to the state acting through its legislative department. Like corporations, however, a state, as it can make contracts and suffer wrongs, so it may, for this reason, and without express provision, maintain, in its corporate name, actions to enforce its rights and redress its injuries.³ But a state is not liable to be sued without its consent;⁴ although it is not unusual for states, by special enactment, to authorize suits to be brought against them, but, as the permission is voluntary, they may prescribe the terms, and, unless it impairs the obligation of contracts, may withdraw the consent at pleasure.⁵ A devise to

¹ *Stetson v. Kempton*, 13 Mass. 272, 1816, *per Parker*, C. J.; *Allen v. Taunton*, 19 Pick. 485, 487, opinion by *Dewey*, J., as to power of towns in Massachusetts; *Spalding v. Lowell*, 23 Pick. 71, opinion of *Shaw*, C. J., on same subject.

² *Willard v. Newburyport*, 12 Pick. 227, 230, 1831.

³ *Delafield v. Illinois*, 2 Hill (N. Y.), 159, 162; 26 Wend. 192, 1841, affirming S. C., 8 Paige, 531; *Indiana v. Woram*, 6 Hill (N. Y.) 33, 1843. These cases hold that states may sue as plaintiff in the *state* courts; *State v. Delesdenier*, 7 Texas, 76; *People v. Assessors*, 1 Hill, 620. The governor of a state, as the head of the executive department, is a corporation sole, and bonds made payable to him may be enforced for the benefit of those interested. *Governor v. Allen*, 8 Hump. (Tenn.) 176, 1847; *Polk, Governor, v. Plummer*, 2 *Ib.* 500.

⁴ *Briscoe v. Bank*, 11 Pet. 257, 321.

⁵ *Beers v. Arkansas*, 20 How. 527, 1857; *Dodd v. Miller*, 14 Ind. 433;

a state for any object which it may properly aid or provide for, is valid.¹ Extended consideration of the powers of the states, and of their relation to the United States and to each other, is not within the scope of the present work, which is limited strictly to municipal corporations.

Auditor v. Davies, 2 Pike (Ark.) 494; *Ellis v. State*, 4 Ind. 1; *State v. Trustees*, 5 Ind. 77. The supreme court of the United States has original jurisdiction in cases in which a state shall be a party, as also in suit between states. *Kentucky v. Dennison*, 24 How. 66; *Wisconsin v. Duluth*, 2 Dillon C. C. 1872. The United States Circuit Court has not. *Id.*

¹ *McDonough Will Case*, 15 How. 367, 382, 1853. *Post*, sec. 439.

CHAPTER III.

CREATION, AND SEVERAL KINDS OF MUNICIPAL CORPORATIONS.

In England.—Difference between Regal and Parliamentary Corporations.—Municipal Corporations Act of 1835.

§ 15. In England, corporations can only be *created* in one of two ways: 1, by the king's charter; 2, by act of parliament. They *exist* there, however—1, by the common law; 2, by prescription; 3, by royal charter; 4, by authority of parliament. Corporations at *common law* are those which derive their existence and powers from immemorial usage, although they may have had their origin in an act of parliament or royal grant, no longer discoverable. Those by *prescription* presuppose a grant by charter or act of parliament, which has been lost. Into corporations created by regal or legislative grant may be resolved what have been styled corporations by *implication*, which is, where a body, lawfully constituted, cannot carry into effect its purposes without attributing to it a corporate character. The franchise of being a corporation, and the right to exercise corporate powers and to enjoy corporate privileges, can be claimed in no other way than as above stated. A legal sanction to the corporate character is, therefore, absolutely necessary, and is always implied.¹ The distinction between corporations deriving their existence from the king's charter and those which derive their existence from parliament is important. A royal charter is a written instrument, in the form of letters patent, under the great seal, addressed to all the subjects of the realm, containing a grant, by the crown, to the persons named, of the franchises, powers, and priv-

¹ Willc. 21; Glover, 23; Grant, 6, 7; 1 Kyd, 39; Angell & Am. sec. 69; Bro. Corp. 65; Eastman v. Meredith, 36 N. H. 284, 290, 1858, per Perley, C. J.; St. Louis v. Allen, 13 Mo. 400; Same v. Russell, 9 Ib. 503.

ileges therein mentioned. A *charter of incorporation*, therefore, is the written instrument by which the king creates the corporate body, names it, defines its objects, and confers its powers. Unless restricted in the charter, all of the common law incidents of a corporation attach to it, but no corporation can pursue objects not warranted by its charter. The charter is the organic act which gives to the corporation both its existence and its peculiar character.¹

The king's charter may confer upon the corporation it institutes all the usual and ordinary powers of a corporate body, but it cannot invest such a body with extraordinary powers, such as proceeding in a manner different from the common law, or punishing by forfeiture or imprisonment, or conferring an *exclusive* right of trading. When the king grants clauses which are illegal, they are void, and if clearly illegal and not confirmed by parliament, no length of time or usage will make such clauses valid. But parliament, in the fullness of its power, may grant to corporations which it erects such powers, ordinary and extraordinary, as it deems proper; and it may do, as it has often done, confirm clauses in royal charters which were void, because beyond the king's power to grant.

The king cannot incorporate a body of men *without their assent*. Until his charter has been accepted, it is inoperative.² When once accepted, the acceptance is irrevocable. The acceptance must be by those to whom it is addressed; and it is held that a valid acceptance may be made by a majority of the grantees. The charter must be accepted *in toto*, or not at all, for there can be no partial acceptance without the assent of the crown, which must be shown by matter of record. If the corporation be a new one, acceptance of part of the charter is taken as acceptance of all. Acceptance may be shown by user—by acting under it, as well as by the formal action of the corporate body. After acceptance, the *crown cannot resume the grant*, nor dissolve or destroy the corporation, without the consent of the grantees or their successors. The crown, at common law, can create a corporation for municipal government in any

¹ Outline of municipal charter of the middle ages. *Ante*, sec. 6.

² Acceptance of charter. *Post*, secs. 23, 30, 38, 719, n.

place where there is not, at the time, an existing corporation of the same kind, but there cannot be, concurrently, two corporations, for the same place, having the same or similar powers or jurisdiction. But such limitations upon the power of the crown do not apply with respect to municipal corporations *created by parliament*. Its power is, legally speaking, illimitable. It may create, and abolish, and change, at its pleasure, with or without the assent of the people or corporation to be thereby affected. It may change royal charters, but parliamentary corporations cannot be affected, without the consent of parliament, by charters granted by the crown. Except as to the extent of powers which may be conferred, a parliamentary corporation is, at common law, similar to that which is created by the crown.¹

§ 16. Prior to 1835, many of the towns, boroughs and cities of England were incorporated in one of the ways mentioned; that is to say, there were in them bodies corporate, established for the local government thereof. There was no uniformity in the constitution or powers of these corporate bodies. The corporation proper was not the town or place, but *a corporate body constituted within it*, with powers or jurisdiction, more or less extensive, to govern the inhabitants. These bodies were established at different times, and with different motives. The first distinct recognition of a municipal corporation was in the 18th of Henry VI. (A. D. 1439), with reference to Kingston-upon-Hull, which had an express charter of incorporation granted to it, for the first time, in that year. Charters had previously been granted to it by different sovereigns, at various times, giving it various privileges, but they did not *incorporate* the place, nor was it incorporated until the charter of 18th Henry VI., which is the first that uses terms of incorporation.* Subsequently such corporations were erected from time to time, each with its peculiar constitution, depending on the

* Authorities last cited. Respecting the authority of the crown to grant charters to incorporate towns, since the General Municipal Corporations Act of 1835, see *Rutter v. Chapman*, 8 M. & W. 1; *Reg. v. Boucher*, 8 Q. B. 654; S. C., 2 G. & D. 737.

¹ Glover on Munic. Corp. 16.

provisions of the charter or prescriptive usage. The constitution of the corporations was so various, and is so different from the American model, that it requires care to obtain an accurate idea of it. For illustration, we will take a simple form, viz.: where by charter or prescription the corporation consists of the mayor, aldermen, and commonalty of a town. Here there are three ranks, classes, or parts: 1, the mayor or head officer; 2, the aldermen, the number of whom is definite, being fixed by the charter, or by prescriptive usage; 3, the commonalty, that is, the common freemen, whose number is indefinite, and whose rights, in the course of time, were largely usurped or destroyed. These three classes were denominated the *integral parts* of the corporation, and no corporation was complete (except it be otherwise provided by the charter) unless the mayor, or head officer, a majority of the definite class (that is, a majority of the aldermen), and some members of the indefinite class, or commonalty, be in existence. Hence, during a vacancy in the office of mayor, no valid corporate act can be done except to elect another, since without a mayor the corporate body is incomplete. Hence, also, at every corporate meeting it was essential, at common law, that there should be present the mayor, or head officer, whose duty it was to preside, a majority of each definite integral class, and some members of each indefinite class, if there be more than one such class.

In the course of time great abuses had crept into these bodies, which parliament had frequently been obliged to redress. Complaints of grievances were universal, and misrule, confusion, and internal disputes so general that the municipal system of government fell into great and deserved disrepute. As a measure of reform, the Municipal Corporations Act of 5 and 6 Will. IV. chap. LXXVI. was devised and enacted.¹ "I cordially concur," said the king,

¹ The reformed house of commons presented an address to William IV. requesting the appointment of a commission to inquire into the state of the municipal corporations in England and Wales. The commission which was appointed made a thorough examination of the condition of the various boroughs, and their report disclosed abuses and defects which it seems marvelous that any spirited people so long endured. See chapter I. *ante*, sec. 8.

“in this important measure, which is calculated to allay discontent, to promote peace and union, and to procure for those communities the advantages of responsible govern-

From various sources of information the commission ascertained the existence of two hundred and forty-six corporations, in England and Wales, exercising municipal functions. The population of these corporate places exceeded two millions of people. Some of these corporations claimed to act under prescriptive custom, but most of them under several charters, forming a continued series from a very early date, but generally under charters granted from the reign of Edward I. down to the reign of George IV. inclusive. The number of corporators stated to be definite, in fifty boroughs, varied in most cases from under ten to thirty, and those indefinite, in one hundred and sixty-two boroughs, varied from twelve to five thousand, but usually averaged from fifty to two hundred corporators. The titles to *freedom*, or citizenship, generally comprehended those arising from birth, servitude, marriage, purchase, gift, or election. The governing bodies were formed by the close and corrupt system of *self-election*, in a great majority of the municipalities. The corporate officers, such as the mayor, or other head of the corporation, the recorder—frequently unprofessional—and the town clerk, were appointed by the self-elected governing body from its own immaculate conclave. Most of the municipalities possessed exclusive *criminal jurisdiction*, extending to the trial of felonies and all other offences, whereas many appear never to have had any criminal jurisdiction. Several *boroughs* had civil jurisdiction extending to the decision of all actions; some extending to the decision of personal and mixed actions; others to the decision of personal actions; while in a great number, no civil jurisdiction appeared ever to have existed. *The property*, in some few boroughs, was trivial, but the revenue generally averaged from 500*l*. to 1000*l*. in each, while in some the property exceeded 50,000*l*. per annum. In a few towns corporate, the accounts were printed for distribution and audited publicly; but in most cases, the accounts were neither duly kept, nor audited, nor published, besides being inaccurate and in a generally unsatisfactory state. The annual income of these municipal corporations amounted to about 366,600*l*., and the expenditure to 377,000*l*., while the debt in one hundred and thirty-three exceeded the sum of two millions sterling. Throughout the course of the investigation of the commissioners there were perceptible the same complaints—of magistrates ill qualified, by education and habits, for their situations, generally partial, and sometimes corrupt; of courts, which might be made the instruments of much local advantage, falling into disuse through defects of their original constitution and their recent maladministration; of juries improperly selected by reason of notorious party bias; of revenue misapplied; of debt contracted and of property alienated; of the absence of all accounts and the denial of all accountability by certain corporations; of the insufficiency of the police, the neglect of paving and lighting, and the want of those municipal accommodations for which the public property committed in trust to the corporation would, if duly administered, be amply sufficient to

ment." This act organizes all of the municipal corporations of England and Wales upon a uniform model. It does not altogether destroy their previously existing lawful

provide. Having given a general view of the ordinary constitution of the various municipalities, the commissioners next proceeded to specify some of their defects. The most common and most *striking defect* in the constitution of the municipal corporations was, that the *corporate bodies existed independently of the communities among which they were found*. The corporators looked upon themselves, and were considered by the inhabitants, as separate and exclusive bodies; they had powers and privileges within the towns and cities from which they were named, but, in most places, all identity of interest between the corporation and the inhabitants disappeared. That was the case even where the corporation included a large body of inhabitant freemen. It appeared in a more striking degree as the powers of the corporation had been restricted to smaller numbers of the resident population, and still more glaringly when the local privileges had been conferred on *non-resident freemen*, to the exclusion of the inhabitants to whom they rightfully ought to belong. The privilege of electing *members of parliament* being that which, before the passing of the reform act, conferred upon the self-elected governing bodies of close corporate towns their principal importance, and the rewards for political services which the patron was accustomed to distribute among them, caused this function to be considered, in many places, as the sole object of their institution. The power so monopolized and employed in a mode unsuitable to the altered circumstances of the times, led to various abuses of the system. The custom of keeping the number of corporators as low as possible, may be referred to the wish for preserving the parliamentary franchise, rather than to the desire of monopolizing the municipal authority, which had been coveted only as a means of securing the other and more highly prized privilege. A great number of corporations were preserved solely as *political engines*, and the towns to which they belonged derived no benefit, but often much injury, from their existence. To maintain the political ascendancy of a party, or the political influence of a family, was the one end and object for which the powers entrusted to a numerous class of these bodies have been exercised. This object was systematically pursued in the admission of freemen, resident or non-resident; in their election of municipal functionaries for the council or the magistracy; in the appointment of subordinate officers and the local police; in the administration of charities entrusted to the municipal authorities; in the expenditure of the corporate revenue and in the management of the corporate property. The most flagrant abuses arose from this perversion of municipal privileges to political objects. Thus the inhabitants had to complain, not only that the election of their magistrates and other municipal functionaries was made by an inferior class of themselves, or by persons unconnected with the town, but also of the disgraceful practices by which the magisterial office was frequently obtained; while those who, by character, residence, and property, being best qualified to direct and control its municipal affairs, were excluded from

corporate powers, but it does sweep away all laws, statutes, charters and usages inconsistent with or contrary to its provisions. It defines who shall be burgesses or citizens; making the right essentially depend upon occupancy of houses or shops within the borough, and the payment of taxes for the relief of the poor. These burgesses or citizens elect, from time to time, a fixed number of proper persons to be councillors, and the council (composed of the mayor, aldermen, and councillors) elect, from qualified persons, the aldermen, and also the mayor and the ministerial and inferior corporate officers. "*The council*" is the governing

any share in the elections or management. The exclusive and party spirit belonging to the whole corporate body, appeared in a still more marked manner in the councils by which, in most cases, it was governed. These councils were usually *self-elected*, and held their offices *for life*. They were commonly of one political party, and their proceedings were mainly directed to secure and perpetuate the ascendancy of the party to which they belonged. Individuals of adverse political opinions were, in most cases, systematically excluded from the governing body. These councils, which embodied the opinions of a single party, were entrusted with the nomination of magistrates, of the civil and criminal judges, often of the superintendents of police, and were, or ought to have been, the leaders in every measure that concerned the interests and prosperity of the town. So far from being the representatives either of the population or of the property of the town, they did not represent even the privileged class of freemen; and being elected for life, their proceedings were unchecked by any feeling of responsibility. In conclusion, the commissioners reported that there prevailed amongst the inhabitants of a great majority of the incorporated towns a general and a just dissatisfaction with their municipal councils, whose powers were subject to no proper control, whose acts and whose proceedings, being secret, were unchecked by the influence of public opinion; a distrust of the municipal magistracy, tainting with suspicion the local administration of justice, and often accompanied with contempt of the persons by whom the law was administered; a discontent under the burdens of local taxation, while revenues that ought to be applied for the public advantage were diverted from their legitimate use, and sometimes wastefully bestowed for the benefit of individuals, sometimes squandered for purposes injurious to the character and morals of the people. The commissioners therefore felt it their duty to represent to his majesty, that the municipal corporations of England and Wales neither possess nor deserve the confidence or respect of his majesty's subjects, and that a thorough reform must be effected before they can become, what they ought to be, useful and efficient instruments of local government. Glover's Historical Summary of the Corporate System of Great Britain and Ireland, pp. 38 to 45. The result was the Municipal Corporations Act of 5 and 6 Will. IV. chap. LXXVI.

body of the corporation, and its most important powers are defined by various acts of parliament. It will thus be perceived that the original power is in the burgesses or citizens, and that the act adopts the representative system, and proceeds upon the idea that a substantial interest in the incorporated place, which is made necessary in order to be a burgess or citizen, will induce care in the selection of councillors, and that frequent elections will prove the most effectual check on those entrusted with the administration of the municipal authority, which is carefully limited and defined.

The act of 1835, with some amendments, constitutes the body of the existing English municipal corporations system, and its leading provisions are so important to be understood in the study and application of the English cases to questions arising in this country, and contain so much of interest to the lawyer, the legislator, and the municipal inquirer, that they are given or referred to in the note.¹

¹ *Municipal Corporations Act of 5 and 6 Will. IV. cap. 76, passed September 9, 1835.*—NAME, &c. This act commences by reciting, that "Whereas, divers bodies corporate at sundry times have been constituted within the cities, towns, and boroughs of England and Wales, to the intent that the same might forever be and remain well and quietly governed; and it is expedient that the charters by which said bodies corporate and constituted, should be altered in the manner hereinafter mentioned; be it therefore enacted, that so much of all laws, statutes, and usages, and so much of all royal and other charters, now in force, relating to the several boroughs named in schedules (A and B) annexed, as are inconsistent with, or contrary to, this act, *shall be*, and the same are hereby, *repealed and annulled*" (sec. 1), with the reservation of certain rights, beneficial exemptions, and franchises to the freemen or citizens (secs. 2-5). These schedules contain an alphabetical list of all the incorporated boroughs, with the number of wards, number of aldermen, and number of councillors, and style of the corporate body in each; thus: "*Bath*,—Seven wards, fourteen aldermen, forty-two councillors." *Corporate name*—"Mayor, Aldermen, and Citizens of the City of Bath." If it be a borough instead of a city, the word "Burgesses" is used instead of "Citizens." The act provides that the body corporate in each of said places "shall take and bear the name of the Mayor, Aldermen, and Burgesses [or Citizens, in case of a city] of such borough, and by that name shall have perpetual succession, and shall be capable in law, *by the council* hereinafter mentioned of such borough to do," &c. (sec. 6).

MEMBERSHIP.—Before the passage of the act under consideration, the qualifications for members or officers of municipal corporations depended

In the United States.

§ 17. The proposition which lies at the foundation of the law of corporations of this country is, that here, all

upon the charter, usage or by-laws of the particular corporation—the usual qualifications being that the person claiming to be admitted to the freedom of the corporate town should be the son of a freeman, or should have served an apprenticeship to a freeman, or (in some instances) married his daughter, or acquired the privilege by gift or purchase; but this act provides that hereafter “no person shall be elected, made, or admitted a burgess or freeman of any borough by gift or purchase” (sec. 3). It fixes the *qualification of burgesses or citizens*, thus: “Every male person, of full age, who shall have occupied any house, warehouse, counting-house, or shop, within any borough” for three years, “and during the time of such occupation been an inhabitant householder within the borough, or within seven miles of the borough, shall, if duly enrolled, *be a burgess of such borough and a member of the body corporate of the mayor, aldermen, and burgesses of such borough*, provided he shall have been rated in respect to the premises so occupied by him to all rates made for the relief of the poor within the parish” (sec. 9). Such resident occupiers and tax-payers, only, are members of the corporate body of the place; all the other inhabitants are no part of the municipal corporation, though subject to its government.

COUNCILLORS, HOW CHOSEN, &c.—Upon the first day of November, in every year, the *burgesses* so enrolled in every borough *shall openly assemble*, and elect from the persons *qualified to be councillors* [who must have the qualifications of a burgess, and also increased pecuniary and rating qualifications], the councillors of the borough” (sec. 40), of whom one-third part go out of office annually. The elections are held before the mayor and assessors, and the mode of voting (which is exactly the opposite of the ballot in America) is by delivering to the officers of election a voting-paper containing the name and abode of the person voted for, and signed with the name and abode of the voter. It is thus seen that the burgesses elect the councillors, whose qualifications are fixed by the statute, and whose number in each incorporated place is definite.

ALDERMEN, HOW CHOSEN.—On the ninth day of November, in every third succeeding year, the council for the time being are directed to elect, “*from the councillors, or from persons qualified to be councillors*, the aldermen of the borough,” who are one-third in number of the councillors (sec. 25). The manner of election is prescribed, namely, by every member of the council delivering to the mayor, or chairman, a voting-paper signed by the member voting, which the mayor, or chairman, is directed openly to read. (Act 7 Will. IV. and 1 Vict. chap. LXXVIII. sec. 14; 16 and 17 Vict. chap. LXXIX. sec. 13.)

MAYOR, HOW CHOSEN.—At the meeting of the council, to be held on the ninth day of November, each year, the council are directed to *elect, out of the aldermen or councillors*, a fit person to be the *mayor*, who shall continue

corporations, public and private, exist and can exist only by virtue of express *legislative enactment*, creating, or authorizing the creation of the corporate body. Legislative sanction is absolutely essential to lawful corporate existence. That a corporation may here exist by prescription, and its existence be established by long and undisputed user of corporate powers may (as the cases hereafter referred to will show) be true, but this prescription and user suppose a leg-
in office for one year (sec. 49) and until his successor shall have accepted and qualified (6 and 7 Will. IV. chap. CV. sec. 4).

WHO COMPOSE THE COUNCIL, &c.—The mayor, the aldermen, and the councillors, for the time being, constitute "*the council*" of the borough (sec. 25). The council, as we have seen, elect the mayor and the aldermen, and it also appoints the clerk, treasurer, and other corporate officers. The corporate body acts by and through the council, who have the authority of the old corporations, except as modified. Provision is made for the stated and special meetings of the council; the notice prescribed, the quorum fixed; the presiding officer defined, &c., &c. Power is given to make by-laws, and the powers of the council defined, and provision is made for powers vested in trustees, under sundry local acts of parliament, for paving, lighting, supplying with water or gas, cleansing, watching, regulating, or improving, or for providing or maintaining a cemetery or market in the boroughs being transferred to the body corporate of the borough (sec. 75, 20 and 21 Vict. chap. L.). By other acts of parliament the boundaries of boroughs are fixed (6 and 7 Will. IV. chap. CIII. 1836); the "administration of the borough fund" regulated (*Ib.* chap. CIV.); "the administration of justice" provided for (*Ib.* chap. CV.; 13 and 14 Vict. chap. XCI.); borough rates regulated (7 Will. IV. and 1 Vict. chap. LXXXI. 1837; 2 and 3 Vict. chap. XXVIII.; 3 and 4 Vict. chap. XXVIII.; 4 and 5 Vict. chap. XLVIII.; 5 and 6 Vict. chap. XCVIII.); power to sell and mortgage property and to charge rates given (5 and 6 Vict. chap. XCVIII.; 23 and 24 Vict. chap. XVI.); provision made as to maintaining bridges (13 and 14 Vict. chap. LXIV. 1850); to promote public libraries (18 and 19 Vict. chap. LXX. 1855; 29 and 30 Vict. chap. XCIV.); in relation to the police (19 and 20 Vict. chap. LXIX.; 27 and 28 Vict. chap. LXIV.; 28 and 29 Vict. chap. XXXV.); the management of highways, by enabling councils to adopt parish roads and apply their funds to their repair (25 and 26 Vict. chap. LXI.); for safe keeping of petroleum (25 and 26 Vict. chap. LXVI.); for the protection of gardens and ornamental grounds (26 and 27 Vict. chap. XIII.); in relation to prisons (28 and 29 Vict. chap. CXXVI. known as "The Prisons Act, 1865;" 29 and 30 Vict. chap. C.). A variety of other statutes, of less importance, in relation to municipal corporations, have been passed since the general act of 1835, some amendatory of it and some making new and additional provisions. By the famous Disraeli reform bill of 1867, the right to vote for a member, or members, to serve in parliament for boroughs was extended to large numbers or classes of persons who did not before possess the franchise. *New American Encyclopedia*, 1868, p. 327.

islative grant. Instances of prescriptive corporations, with us, are rare and exceptional. But corporations, public and private, by virtue of direct legislative authorization, are being created in such vast numbers as to constitute one of the most marked and important features of the present age. Speaking of "corporations by statute," in England, Mr. Willcock says that "the legislature has not often exercised the power of creating municipal corporations, because it has been esteemed a flower of the prerogative."¹ This has reference to a period anterior to the famous Municipal Corporations Act of September 9, 1835 (5 and 6 Will. IV. chap. LXXVI.), by which parliament undertook the regulation of this important subject.² The existing law of corporations is essentially of modern growth, and has yet largely to be developed and settled. Having occasion to refer to this subject in a recent case in Illinois, a distinguished judge said: "Formerly but few private corporations were created, and these cut so small a comparative figure in the destinies of states, that they attracted but little attention on the part of law makers, and were but little studied by the courts. Even in England, until a very recent period, both public and private corporations were created by royal prerogative, without the intervention of parliament, and were invested with such powers and privileges as favorites might ask, or the public good be supposed to require. But even then such corporations were rare. Now they have become among the greatest means of state and national prosperity. It is probably true, that more corporations were created by the legislature of Illinois, at its last session, than existed in the whole civilized world at the commencement of the present century. This state of things has necessarily led to a more careful study of the whole subject, both by legislators and the courts." Not only are commercial or business corporations being thus multiplied, but municipal corporations, in all of the states, are constantly created and universally adopted as part of the ordinary machinery of government, so that it is rare to find a town or city of any size not incor-

¹ Willc. on Munic. Corp. 25.

² *Ante*, Sec. 16.

³ *Per Caton, J., Railroad Co. v. Dalby*, 19 Ill. 353, 1857. See, also, similar observations of *Rogers, J.*, in *Bushnell v. Insurance Co.* 15 Serg. & Rawle, 176, 177.

porated and invested with the power of local government. There are in the United States thousands of incorporated places acting under special charters granted by the states or general incorporation acts passed by them.

§ 18. The power of *congress* to create or authorize the creation of corporations, public or private, whenever these become an appropriate means of exercising any of the constitutional powers of the general government, or of facilitating its lawful operations in the states or territories, must be taken to be conclusively settled by the supreme court.¹ This power has been exercised on important occasions, such as incorporating the banks of the United States, the national banks, and the Pacific Railroad Company, and, within the above limitations, it is no longer disputed. Congress habitually passes acts for the organization of territories and territorial governments, which are, in substance and effect, municipal corporations on a large scale and of a peculiar character; but it is not within the power of congress to establish ordinary municipal corporations within the limits of the states, and it has never attempted to exercise it.

In a territorial organic act, a provision that the power of the territorial legislature “shall extend to all *rightful subjects of legislation*,” authorizes the legislature to create municipal corporations, and to invest them with the power to make ordinances, and to provide corporation courts in which to enforce them. And such courts may be provided, although by the organic act it is declared that the *judicial power* of the territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace.²

¹ McCullough v. Maryland, 4 Wheat. 316; Osborn v. Bank of U. S., 9 Ib. 738; Thompson v. Pacific Railroad Co., 9 Wall. 579; Pacific Railroad v. Lincoln Co., 1 Dillon C. C. 314, 1871.

² State v. Young, 3 Kansas, 445, 1866; Burnes v. Achison, 2 Ib. 454; S. P. Reddick v. Amelia, 1 Mo. 5, 1821. In this case the objection made was, that such a legislature was not sovereign, and that nothing short of sovereign power could create a corporation. The answer given was, that congress could give, and had given, the power to legislate on such subjects. That a territorial legislature, vested with general legislative powers, may create a corporation, which is not affected by the subsequent adoption of a state constitution, was held in Vincennes University v. Indiana, 14 How. 268, 1852. See, also, Vance v. Bank, 1 Blackf. (Ind.) 80; Myers v. Bank, 20 Ohio, 283; Deitz v. City, 1 Colorado, 323.

§ 19. In this country, until comparatively a recent period, municipal corporations have been created singly, each with its special or separate charter passed by the legislature of the state. These charters, in all of the states, were framed after the same general model, but in the extent of the special powers conferred, and in the peculiar constitution of the governing body, and the like, there was great variety. It will be useful to notice the outline features of one of these charters, since it constitutes the organic act of the corporation, and bestows upon it its legal character. Such a charter usually sets out with an incorporating clause declaring, "that *the inhabitants*' of the town of (naming it), or city of (naming it), are hereby constituted a body politic and corporate by the name and style of the 'town of —,' or 'city of —,' and by that name shall have perpetual succession, may use a common seal, sue and be sued, purchase, hold, and sell property," &c. The charter then defines the *territorial boundaries* of the town or city thus incorporated. After that follow provisions relating to the governing body of the corporation, usually styled the town or city *council*. This is generally composed of one body, though in some instances of two; the members being called aldermen, councilmen, or trustees. The corpo-

It is now provided by act of congress, "That the legislative assemblies of the several territories of the United States, shall not, after the passage of this act, grant private charters or especial privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits." Act of March 2, 1867, 14 Stats. at Large, 426, sec. 1.

¹ In public corporations, as cities, towns, parishes, school-districts, membership is constituted by living within certain limits, whatever may be the desire of the individual thus residing or that of the municipal or public body. In private corporations, on the other hand, especially those organized for pecuniary profit, membership is constituted by subscribing to or receiving, with the assent of the corporation, when that is necessary, transfers of its stock. *Overseers of Poor, &c. v. Sears*, 22 Pick. 122, 130, *per Shaw*, C. J.; *Oakes v. Hill*, 10 Pick. 333, 346, *per Morton*, J.; *ante*, sec. 9, and notes. It is the citizens or inhabitants of a city, not the common council or local legislature, who constitute the "corporation" of the city. The officers of the council and other charter officers are the agents or officers of the corporation. *Lowler v. Mayor, &c. of N. Y.*, 5 Abbott's Pr. R. 325; *Clarke v. Rochester*, 24 Barb. 446, 1857.

ration is divided into *wards*, and each ward elects one or more aldermen, the number being specified and definite. The qualifications of the voters are fixed by the charter, which are, usually, that the voter shall be a male citizen of the United States and of the state, be of age, and a resident, for a specified time, within the limits of the corporation. The mode of holding elections is specified; and the power is often given to the council to canvass returns, and to settle disputed elections to corporate offices. Provision is made for the election of a mayor, or other chief executive officer of the corporation, and his duties defined. The charter contains a minute and detailed enumeration of the powers of the city council, which are usually numerous; the most important of which are, the authority to create debts (sometimes restricted); to levy and collect taxes within the corporation, for corporate purposes; to make local improvements and assessments to pay therefor; to appoint corporate officers; to enact ordinances to preserve the health of the inhabitants, to prevent and abate nuisances, to prevent fires, to establish and regulate markets, to regulate and license given occupations, to establish a police force, to punish offenders against ordinances; to open and grade and improve streets; to hold corporation courts, &c., &c. When it is remembered that the charter of such a corporation is its constitution, and gives it all the powers it possesses (unless other statutes are applicable to it), its careful study, in any given case, is indispensable to an understanding of the nature of the powers it confers, the duties it enjoins, and liabilities it creates. The construction of its various provisions, and the determination of the relation which these bear to the general statutes of the state; how far the charter controls, or how far it is controlled by other legislation, are among the most difficult problems which perplex the lawyer and the judge. The study of a question of corporation law begins with the charter, but it must, oftentimes, be pursued into the general statutes and legislative policy of the state, and after this into the broad field of general jurisprudence.

§ 20. Within a period comparatively recent, the legislatures of a number of the states, following the example of the

English Municipal Corporations Act of 5 and 6 Will. IV. cap. LXXVI. heretofore mentioned, have passed *general acts* respecting municipal corporations. These acts abolish all special charters, or all with enumerated exceptions, and enact general provisions for the incorporation, regulation, and government of municipal corporations. The usual scheme is to grade corporations into classes, according to their size, as into Cities of the First Class, Cities of the Second Class, and Towns, or Villages, and to bestow upon each class such powers as the legislature deems expedient; but the powers and mode of organization of corporations of each class are uniform.¹ General incorporation acts, rather than special charters, would seem clearly to be the

¹ *Ohio*.—By the 'Towns', 'Cities', and 'Villages' Act of May 3, 1852 (Swan's Stat. 954), all corporations existing for the purposes of municipal government are thereby organized into *cities* and *incorporated villages*. (Sec. 1.) In respect to the exercise of certain corporate powers, municipal corporations are divided into classes, thus: 1. Cities of first class, which comprise all cities having a population exceeding twenty thousand inhabitants; 2. Cities of the second class, which comprise all cities not embraced in the first class; 3. Incorporated villages; and 4. Incorporated villages for special purposes. *Ib.* sec. 39 *et seq.* These are "declared to be bodies politic and corporate, under the name and style of the city of —, or the incorporated village of —, as the case may be; capable to sue and be sued, to contract and be contracted with, to acquire, hold, and possess property, real and personal, to have a common seal, and to exercise such other powers, and to have such other privileges, as are incident to municipal corporations of like character or degree, not inconsistent with this act or the general laws of the state." *Ib.* sec. 18. These powers and privileges are then specified with great minuteness, twenty sections of the act being devoted to this purpose. Incorporated villages are governed by one mayor, one recorder, and five trustees, elected annually; the mayor, recorder, and trustees constituting the village council, any five of whom make a quorum. *Ib.* sec. 43. The corporate authority of cities is vested in the mayor, one board of trustees (two from each ward), and who compose the city council, together with such officers as are mentioned in the act, or as may be created under its authority. *Ib.* sec. 52 *et seq.*

"The governing all cities and villages under one general law, was a new experiment, supposed to be required by the present constitution. It was to be expected, that, in the working of the experiment, omissions, if not mistakes, would be discovered, to be corrected by additional legislation. It will be a work of care and time to perfect an orderly and harmonious system." *Per Gholson, J.*, in *Thomas v. Ashland*, 12 Ohio St. 124, 130, 1861. *Infra*, sec. 24a.

Iowa.—The Ohio act is, in substance, adopted in Iowa. Revision 1860,

best method of creating and organizing municipal corporations. 1. It tends to prevent favoritism and abuse in procuring extraordinary grants of special powers. 2. It secures uniformity of rule and construction. All being

chap. LI. But it does not apply to cities having special charters, unless adopted by them. *Burke v. Jeffries*, 20 Iowa, 145.

In *Tennessee* (Acts 1849, Chap. 17) provision is made by general act for the incorporation of towns, cities, and villages. The constitution of Tennessee declares, that "The legislature shall have power to grant charters of incorporation as they may deem expedient for the public good." Art. XI. sec. 7. In the *State v. Armstrong*, 3 Sneed, 634, it was held, that the act of 1856, by which full power to *create corporations*, and determine the extent of their powers, was given to the Circuit Courts, was unconstitutional, on the ground that the legislature could not delegate its authority to the courts. But in the *Mayor, &c. v. Shelton*, 1 Head, 24, 1858, it was held, that the act of 1849—which was a general statute for the incorporation of towns and cities, and by which a petition was to be presented by the inhabitants of a place proposing to organize under the act, to the County Court, which had power simply to record the petition and designate the boundaries of the corporation—was not in conflict with the constitution, as the statute, and not the court, determined the extent and nature of the powers of the corporation.

Missouri.—A general act for the incorporation of towns was passed in Missouri in 1845, and it was held not unconstitutional by reason of certain duties which it imposes on the County Court with reference to organization of towns under the act, as these duties are not legislative but judicial, and the law itself, and not the court, declares the powers of which the corporation shall be possessed. *Kayser v. Trustees, &c.*, 16 Mo. 88, 1852.

Indiana.—The general law of 1857, for the incorporation of cities, is not unconstitutional for want of *uniformity* in the mode of their organization. *Lafayette v. Jenners*, 10 Ind. 70, 80, 1857. See also *Welker v. Potter*, 18 Ohio St. 85.

Pennsylvania.—A general act was passed in 1851, designed to form a system for the regulation of boroughs incorporated *thereafter*. *Comw. v. Montrose*, 52 Pa. St. 391.

North Carolina.—By general act, every incorporated town may elect, each year, not less than three, nor more than seven, commissioners, who are a body corporate and the governing body of the town. These commissioners are elected by the vote of the citizens of the place. At the same time they are also to elect a mayor, who presides at the meetings of the commissioners, but who has no vote except in case of a tie. The mayor is both a peace officer and a judicial officer, with the same jurisdiction as a justice of the peace, with power also to "hear and determine all cases that may arise upon the ordinances of the commissioners," &c. The commissioners may levy certain specified taxes, and make ordinances in relation to their officers, records, markets, nuisances, the repair of streets and bridges

created and endowed alike, real wants are the sooner felt and provided for, and real grievances the sooner redressed.

By Implication.

§ 21. It is well settled in England that, while a corporation must commence or be instituted by the proper authority, yet no fixed, prescribed, or precise form of words is necessary, in order to create a corporation. While the words "to found," "to erect or establish," or "to incorporate," are commonly used to evince the intention to erect or create a body politic, they are not necessary.¹ The king

in the town, &c., &c. These general provisions apply to all incorporated towns when not inconsistent with special charters or acts in reference thereto. Rev. Code 1854, chap. III. p. 586.

New York.—In this state there are cities with local and special charters, and also towns whose powers, duties, and privileges are particularly prescribed by statute. Each town is a body corporate for specified purposes; but it is declared that "No town shall possess or exercise any corporate powers except such as are enumerated in this chapter, or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or given." Rev. Sts. part I. chap. XI. p. 337, secs. 1, 2. "The several towns in this state," says, *Denio, J.*, in *Lorillard v. The Town of Monroe*, 11 N. Y. (1 Kern.) 392, 1854, "are corporations for certain special and very limited purposes, or, to speak more accurately, they have a certain limited corporate capacity. They may purchase and hold lands within their own limits for the use of their inhabitants. They may, as a corporation, make such contracts and hold such personal property as may be necessary to the exercise of their corporate or administrative powers, and, as a necessary incident, may sue and be sued, where the assertion of their corporate rights, or the enforcement against them of their corporate liabilities, shall require such proceedings. (1 R. S. 337, sec. 1 *et seq.*) In all other respects—for instance, in everything which concerns the administration of civil or criminal justice, the preservation of the public health and morals, the conservation of highways, roads, and bridges, the relief of the poor, and the assessment and collection of taxes—the several towns are political divisions, organized for the convenient exercise of portions of the political power of the state, and are no more corporations than the judicial, or the senate and assembly districts. *Ib.* sec. 2. The functions and duties of the several town officers respecting *these subjects*, are judicial and administrative, and not in any sense corporate functions or duties," and hence, as to *such subjects*, the towns as corporations are not liable for any default or malfeasance of these officers. See, as to the corporate capacity of towns in New York, *Denton v. Jackson*, 2 Johns. Ch. R. 320; *North Hempstead v. Hempstead*, 2 Wend. 109; affirming *S. C. Hopk.* 288; *Cornell v. Guilford*, 1 Denio, 510.

¹ 10 Co. 27 a, 28 a, 29 b, 30; 1 Kyd, 62; 2 Kent Com. 27.

grants a charter to the men of Dale, that they may annually elect a mayor, and plead and be impleaded by the name of the mayor and commonalty. This is considered to be sufficient to incorporate them.' So a grant by a charter containing no *direct clause* of *incorporation* to the inhabitants of a town "that their town shall be a *free borough*, incorporates it.' So, also, a grant by the king to the men of Dale that they be discharged of tolls, incorporates them for this particular purpose, but does not enable them to purchase.' The settled doctrine is that a corporation may be created by implication, as well as by the use of words. But this implication, to be sufficient, must clearly evince or express the intention to establish or constitute a body politic or corporate—that is, to invest it with corporate powers and privileges. But the absence of *express* provision respecting the *incidents* which the law tacitly annexes to corporations, is considered immaterial. Thus the omission in the charter or act of the words "to plead and be impleaded," or "to have a seal," or "to make by-laws," would not make it essentially defective.' So it would not be essentially defective if the *name* was omitted, if the

¹ 21 Edw. IV. 56. The doctrine of a corporation by implication originated in the time of Edward IV. *Ib.* 8 Edw. IV. 28. *Post*, sec. 431.

² Kyd, 62, cites *Firm. Burg.* chap. II.; *Madox Hist. Exch.* 402.

³ *Vin. Abr. Corp.* F. pl. 6; *Ib.* pl. 4; *Bagot's Case*, 7 Edw. IV. 29; *Grant on Corp.* 43, note *c*, and cases cited.

⁴ 1 *Roll. Abr.* 513; 1 *Kyd*, 63; *The Conservators, &c. v. Ash*, 10 *Barn. & Cress.* 349; 21 *Eng. C. L.* 97, 1829. "It is not necessary," says Mr. Kyd, "that the charter should *expressly* confer those powers without which a collective body of men cannot be a corporation, such as the power of suing and being sued, and to take and grant property, though such powers are, in general, expressly given." 1 *Kyd Corp.* 63. Thus, in the case of the *Borough of Yarmouth*, 1609, 2 *Brownlow & Goldsb.* 292, part II. it was decided by the common bench, *per* Lord Coke, that a grant of incorporation to the burgesses or citizens of a borough or city, which, being an old grant, should be favorably construed, was good, without the words "their successors." And see, on this subject, the learned opinion of *Shaw*, C. J., in *Overseers of Poor, &c. v. Sears*, 22 *Pick.* 122, 130, 1839. He says: "The *mode* of perpetuating the existence of a corporate body is not essential; all that is essential is that some mode be provided by the charter or act by which it is constituted, or by the general laws of the government, by means of which it shall be so perpetuated." 22 *Pick.* 130; *The Conservators v. Ash*, 10 *Barn. & Cress.* 249; 21 *Eng. C. L.* 97.

name could be ascertained from the terms of the charter or act, or from the nature of the thing or matters granted.' Certain attributes or powers are absolutely essential to constitute a body corporate, such as perpetual succession, the right to contract, to sue and be sued as a corporation, &c. Now if the charter or act, which is relied upon as creating a body corporate by implication, instead of simply *omitting* to express these essential properties, negatives and excludes them, it is plain that the body would not be deemed incorporated.*

§ 22. Although corporations in this country are created by statute, still the rule is here also settled that not only private corporations aggregate, but municipal or public corporations, may be established without any particular form of words, or technical mode of expression, though such words are commonly employed.¹ If powers and privileges are conferred upon a body of men, or upon the residents or inhabitants of a town or district, and if these cannot be exercised and enjoyed, and if the purposes intended cannot be carried into effect, without acting in a corporate capacity, a corporation is, to this extent, created by implication. The question turns upon the intent of the legislature, and this can be shown constructively as well as expressly.⁴ This is well illustrated in a case in Massachusetts,⁵ where the question was whether the plain-

¹ Trustees v. Parks, 10 Maine (1 Fairf.) 441; School Com. v. Dean, 2 Stew. & Port. (Ala.) 190, 1832.

² Grant on Corp. 30.

³ Thomas v. Daken, 22 Wend. 9, 84, *per Cowen, J.*, and authorities cited; Bow v. Allentown, 34 N. H. 351, 372; Stebbins v. Jennings, 10 Pick. 172; Benton v. Jackson, 2 Johns. Ch. 325, 326, 1817; Mahoney v. The Bank of the State, 4 Ark. 620, 1842; S. C. well digested in Angell & Ames on Corp. sec. 77; North Hempstead v. Hempstead, 2 Wend. 100, 133, opinion by *Savage, C. J.*; Conservators of River Tone v. Ash, 10 Barn. & Cress. 349; Jeffreys v. Garr, 2 B. and Adol. 841; *ex parte* Newport Trustees, 16 Sim. 346; 2 Kent Com. 27.

⁴ Same cases last cited.

⁵ Inhabitants, &c. v. Wood, 13 Mass. 193, 1816—Mr. Fessenden, for the plaintiff, and Mr. Greenleaf, for the defendant. In Bow v. Allentown, 34 N. H. 451, it was held that the annexation, by the legislature, of other territory to *the town* of Allentown made that a corporate town by *implication*.

tiffs were a corporate body, with power to sue. They were not incorporated expressly. But, by statute, the inhabitants of the several school districts were empowered, at any meeting properly called, to raise money to erect, repair, or purchase a school house, to determine its site, &c., &c., the majority binding the minority. The cause was argued by able counsel, and, after several consultations, the supreme court all finally agreed in the opinion that the plaintiffs possessed sufficient corporate powers to maintain an action on a contract to build a school-house, and to make to them a lease of land. But the *intention* of the legislature, where it is sought to show that a corporation has been created by implication, must plainly appear.¹

Acceptance of Charter.

§ 23. The rule which applies to private corporations, that the incorporating act is ineffectual to constitute a corporate body until it is *assented to or accepted* by the corporators, has no application to statutes creating municipal corporations. These are imperative and binding without any consent, unless the act is expressly made conditional. All who live within the limits of the incorporated district are bound by them, and can only withdraw from the corporation by removal. Over such corporations the legislature, unless restrained by the constitution, has entire control; and unless otherwise provided by the act itself, or a different intention be manifested, the public corporation is legally constituted as soon as the incorporating act declaring it to exist goes into effect.* But while the legislature is not

if it was not so before; and such, also, was the effect, under the constitution of New Hampshire, of a grant to a place having less than one hundred and fifty polls to send a representative. A legislative grant gives capacity to hold the thing granted. Lord v. Bigelow, 6 Verm. 465.

¹ Medical Institute v. Patterson, 1 Denio, 61; S. C. affirmed in court of errors, 5 ib. 618, 1846; Myers v. Irwin, 2 Serg. & Rawle, 368, 1816; Angell & Ames, Sec. 79, and cases cited; Wells v. Burbank, 17 N. H. 393; Society, &c. v. Town of Pawlet, 4 Pet. (U. S.) 480, 502. To establish a corporation by implication, says *Shaw*, C. J., in *Stebbins v. Jennings*, 10 Pick. 172, it must appear that the rights and powers conferred can only be enjoyed by the exercise of corporate powers, and, therefore, if such powers are not necessary, they are not impliedly given.

¹ Berlin v. Gorham, 34 N. H. 266, 1856, *per Bell*, J., where it is accord

bound to obtain the acceptance or assent of the municipal corporation, it is well established that a provision in a municipal charter that it shall not take effect unless assented to or accepted by a majority of the inhabitants, is not unconstitutional, it being in no just sense a delegation of legislative power, but merely a question as to the acceptance or rejection of a charter.¹ So a provision in a charter, or

ingly held, that to make an incorporation of a town effectual, it is not necessary that there should be a legal town meeting holden in it. See also *People v. Wren*, 4 Scam. 269; *Warren v. Charlestown*, 2 Gray, 104; *Mills v. Williams*, 11 Ire. 558; *State v. Curran*, 7 Eng. 321; *Fire Department v. Kip*, 10 Wend. 267; *People v. Morris*, 13 Wend. 325, 337; *Brouwer v. Appleby*, 1 Sandf. 158, 1847; *People v. President*, 9 Wend. 351; *Wood v. Bank*, 9 Cow. 194, 205, 1828; *Proprietors, &c. v. Horton*, 6 Hill, 501; *Gorham v. Springfield*, 21 Maine, 58, 1842; *People v. Stout*, 23 Barb. 349, 1856; *Bristol v. New Chester*, 3 N. H. 523, 532, 1826; *State v. Canterbury*, 8 Fost. 218. Acceptance, when requisite, may, doubtless, be implied, in proper cases, as where no particular mode of expressing acceptance is prescribed, from corporate acts and conduct, as in cases of private corporations. *Taylor v. Newberne*, 2 Jones Eq. (N. C.) 141, 1855. See *Zabriskie v. Railroad Co.*, 23 How. (U. S.) 381, 397, 1859.

¹ *People v. Salomon*, 51 Ill. 53, 1869; *Alcorn v. Horner*, 38 Miss. 652, 1860; *Patterson v. Society, &c.*, 4 Zabr. (N. J.) 385, 1854; *Smith v. McCarthy*, 56 Pa. St. 859; *County v. Quarter Sessions*, 8 Barr. 395; *Commonwealth v. Painter*, 10 I. b. 214; and see also *Bull v. Read*, 13 Gratt. (Va.) 78, 1853; *People v. Reynolds*, 5 Gilm. (Ill.) 1; *State v. Scott*, 17 Mo. 521; *Hudson Co. v. State*, 4 Zabr. 718; *Bank v. Brown*, 26 N. Y. 467, 1863. This case asserts a distinction between a bill submitted to the people of the whole state for adoption or rejection, and an act which leaves it to the inhabitants of a particular locality whether they will avail themselves of its provisions. It has been held in New Hampshire that it was competent for the legislature, under the constitution of the state, to enact a penal law which shall have effect only in those towns which adopt it by vote. *State v. Noyes*, 10 Fost. 279, 1855. An amendment to a city charter was to take effect only when adopted "by a majority of the voters of the city." This was considered to manifest the intention to present the question of acceptance to the voters at a regular *city* election. The council ordered the vote to be taken at the *township* polls; the voters of the two organizations possessing different qualifications, but the township and city occupied precisely the same territory: Held, that the election was of no validity, and that the amendment had never been duly accepted. *Foote v. Cincinnati*, 11 Ohio, 408, 1842.

A useful article upon the Constitutionality of *Local Option Laws* will be found in 12 Am. Law Reg. (N. S.), March, 1873, p. 129. Affirming the principle that municipal or public corporations or the people thereof may by the legislature be invested with the power to regulate or prohibit the

the constituent act of a municipal corporation, by which the right to make certain improvements or to create certain liabilities is made to depend upon a vote of the people interested, has frequently been upheld as valid.¹ So an act directing an election to be held by the qualified electors interested to determine, by ballot, whether a newly-erected township should be continued, is constitutional.² On the same principle the legislature may provide that a statute

retail of intoxicating drinks, the supreme court of New Jersey have recently decided the *Chatham Local Option Law*, which declared the retail of ardent spirits without license to be unlawful, and which provided that no license should be granted if a majority of the voters of a township voted "no license," to be constitutional. *State v. Morris Common Pleas*, 12 Am. Law Reg. (N. S.) 32. See also, in Pennsylvania, the very recent case of the *Comw. v. Locke, et al. City Commissioners*, not yet reported, which involved the question of the validity of the act of May, 1871, "to allow the voters of the 22d Ward of Philadelphia to vote on the question of granting licenses to sell intoxicating liquors."

¹ *Clarke v. Rochester*, 28 N. Y. 605; *Bank of Rome v. Rome*, 18 N. Y. 38; *Trustees v. Cherry*, 8 Ohio St. 564; *Burnes v. Achison*, 2 Kansas, 454, 1864; *Bank v. Brown*, 26 N. Y. 467; *Hammond v. Haines*, 25 Md. 541; *Railroad Co. v. Commissioners*, 1 Ohio St. 77; *Foot v. Cincinnati*, 11 Ohio, 408, 1842; *St. Louis v. Alexander*, 23 Mo. 483; *Blanding v. Burr*, 13 Cal. 343. These cases are distinguishable from *Barto v. Himrod*, 4 Seld. 483.

² *Commonwealth v. Judges, &c.*, 8 Pa. St. 391; distinguished from *Parker v. Commonwealth*, 6 *Ib.* 507; *Commonwealth v. Painter*, 10 Pa. St. 214, 1849; *Smith v. McCarthy*, 56 Pa. St. 359. Where the authority to act depends upon the prior sanction of "a majority of the qualified voters" residing in the corporation, the presumption is, that all who vote are legal voters; and the better view probably is, that those who do not vote acquiesce in the result, and that a majority of those actually voting is sufficient, though in point of fact, it may not be a majority of all who would be entitled to vote. *State v. Binder*, 38 Mo. 450, 1866; *State v. Mayor, &c.* 37 Mo. 270. And of this opinion is the Supreme Court of the United States, in which, in an action on municipal bonds, the phrase "a majority of the legal voters of the township" was held to mean a majority of the legal voters of the township voting at the election. *St. Joseph Township v. Rogers*, Dec. Term, 1872; *People v. Warfield*, 20 Ill. 163; *People v. Weant*, 48 Ill. 263; *Railroad v. Davidson County*, 1 Sneed (Tenn.) 692; *Talbot v. Dent*, 9 B. Mon. 526; *Angell & Ames Corp.* 9 ed. secs. 499, 500. But compare *State v. Winkelmeier*, 35 Mo. 103, which construes such language to require a "majority of all the legal voters of the city, and not merely of all who might, at a particular time, choose to vote upon it." See *Damon v. Granby*, 2 Pick. 345, 355, 1824, and chapter on Corporate Meetings, *post* *Infra*, sec. 25, note.

shall cease to exist unless the municipal corporation to be affected by it shall, within a prescribed period, assent to it.

Special Constitutional Provisions.

§ 24. The constitutions of many of the states contain provisions respecting the creation and powers of municipal corporations. In some of the constitutions the legislature is in terms allowed to create corporations for municipal purposes by *special act*,¹ and, in others, it is, in terms, forbidden to do this, and required to provide a *general law* for all corporations, public and private.² So far as municipal

¹ *Corning v. Greene*, 23 Barb. 33, 1856.

² *Post*, Chap. IV. *New York* constitution, 1846, art. VIII. sec. 1; *Illinois* constitution, 1847, art. X. sec. 1; see, also, new constitution, 1870; *Michigan* constitution, 1850, art. XV. sec. 1; *California* constitution, 1849, art. IV. sec. 31; construed, *Railroad Co. v. Plumas Co.*, 37 Cal. 354; *Minnesota* constitution, 1857, art. X. sec. 2; *Tierney v. Dodge*, 10 Minn. 171; 13 *Ib.* 41; *Oregon* constitution, 1857, art. XI. sec. 2; *Louisiana* constitution, 1864, title VII. art. CXXI.; *Nevada* constitution, 1864, art. VIII. sec. 1; construed, *Virginia City v. Mining Co.*, 2 Nev. 86. In *Missouri* it is provided that no municipal corporation shall be created by special act, except cities of at least 5,000 inhabitants, the special act to be approved by a vote of the inhabitants. Constitution 1865, art. VIII. sec. 5.

³ *Iowa* constitution, 1857, art. III. sec. 30; *Von Phul v. Hammer*, 29 Iowa, 222; *Florida* constitution, 1865, art. IV. sec. 20; *Nebraska* constitution, art. VIII. secs. 1 and 2. By the new constitution of *Illinois*, special legislation is forbidden "incorporating cities, towns, or villages, or changing or amending the charter of any town, city, or village." *Kansas* constitution, art. XII. secs. 1 and 5; construed, *Wyandotte City v. Wood*, 5 Kansas, 603; *Achison v. Barlow*, 4 *Ib.* 124. The constitution of *Ohio* is as follows: "The general assembly shall provide for the organization of cities and incorporated villages by *general laws*, and restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power." Constitution A. D. 1851, art. XIII. sec. 6. Under this section the legislature, by the Towns' and Cities' Act of May 3, 1852 (Swan & Critchf. Stats. 1497), undertook to provide for the government of all such places by a general statute. *Thomas v. Ashland*, 12 Ohio St. 124. An act applying to *all cities* of the first class containing less than one hundred thousand inhabitants, is not in conflict with the provision of the constitution which requires all laws of a general nature to have a uniform operation throughout the state. *Welker v. Potter*, 18 Ohio St. 85, 1868; see also *Lafayette v. Jenners*, 10 Ind. 70, 80, 1857. Construction of constitutional provision that there shall be "but one sys-

corporations and their rights are protected by constitutional provisions, express or implied, they are removed from legislative control, but no further, as we shall see in a subsequent chapter. Although the constitution of a state may recognize the municipal corporation of an important city by fixing the number of certain officers, and providing for their election, &c., yet this does not make the charter of the city a constitutional charter conferring powers beyond the control of the legislature.¹

§ 24a. The constitution of Kansas, as well of Ohio, in the article entitled "Corporations," contains a provision

tem of *town* and *county* government," which "shall be as nearly uniform as practicable." *State v. Dousman*, 28 Wis. 541, 1871; *State v. Riordan*, 24 Wis. 484, 1869.

¹ *Baltimore v. Board of Police*, 15 Md. 376, 1859; see also *Paterson v. Society, &c.* 4 Zabr. (N. J.) 385, 1854. In *People v. Draper*, 15 N. Y. 561, *Brown, J.*, says: "When the present constitution was formed, the entire territory of the state was separated, and appropriated by its civil divisions, its counties, cities, and towns. These civil divisions are coeval with the government. The state has never existed a moment without them. All our thoughts and notions of civil government are inseparably associated with counties, cities, and towns. They are permanent elements in the frame of government; they are institutions of the state, durable and indestructible by any power less than that which gave being to the organic law. They are, however, subject to control and regulation by the legislature. It may enlarge or circumscribe their territorial limits, increase or diminish their numbers, separate them into parts, and annex some of the parts to parts of others; but they must still assume the form and be known and governed only as counties, cities, or towns. The state at large is, and ever has been, an aggregate of these local bodies." To same effect, in same case, *Ib.* 541, *per Denio*, C. J. See also *People v. Morrell*, 21 Wend. 563 (division of counties); *ante*, pp. 81-91. In *People v. Hurlburt*, decided by the Supreme Court of Michigan, in 1871, 24 Mich. 44, this subject is largely and learnedly examined by Mr. Justice *Cooley*, who, conceding to the state full authority to shape and control municipal organizations at its will, nevertheless maintained that there were, in the constitution of that state, both express and implied restrictions upon the legislative dominion over municipal institutions, and that local governments and the right of the people to them were secured by the constitution, and did not exist by the favor and at the mere pleasure of the legislature. And in the same case the court decided, under a special provision of the constitution of the state, elsewhere noticed, that the legislature could not appoint, for a city corporation, officers whose duties were purely local and strictly municipal. The discussions by all of the judges are unusually interesting. *Ante*, p. 84, *et seq.*

that "the legislature shall pass no *special act* conferring *corporate powers*," and the Supreme Courts of those states have decided that the provision applied to *municipal* as well as private corporations;¹ and that the effect was to compel the legislatures of those states to regulate the grant of powers to municipal corporations by *general* laws. Hence an act *specially* amending the charter of a city in respect to making local improvements or assessments,² or specially extending the limits of a particular city,³ is unconstitutional. And so it seems is an act which authorizes a city by name to issue its scrip for a particular purpose, and to levy taxes to pay it in aid of a single enterprise—the court inclining to hold such an enactment to be a

¹ Constitution of *Kansas*, art. XII. Secs. 1 and 2 of art. XIII. of the constitution of *Ohio* is the same as sec. 1, art. XII. of the constitution of *Kansas*. Sec. 6, art. XIII. of the *Ohio* constitution is the same as sec. 5, art. XII. of the *Kansas* constitution. There is a similar constitutional provision in *Nebraska*, and perhaps in other states. *Supra*, sec. 24.

² *Atchison v. Bartholew*, 4 *Kansas*, 124, 1866; *Wyandotte City v. Wood*, 5 *Kansas*, 603, 1870; *The State v. Cincinnati*, 20 *Ohio St.* 18, 1870; following *Atkinson v. Railroad Co.*, 15 *Ohio St.* 21, 1864.

³ *Atchison v. Bartholew*, *supra*.

⁴ *Wyandotte v. Wood*, *supra*; *State v. Cincinnati*, *supra*. In the case last cited, the Supreme Court of Ohio, under the constitutional provision quoted in the text, held that the legislature cannot by special act create a corporation; nor by special act confer additional powers on a corporation already existing, and that in these respects there was no difference between private and municipal corporations, since the constitution equally embraced and equally applies to both classes; and therefore the act of April 16, 1870, "to prescribe the corporate limits of Cincinnati," being considered a special act, was adjudged void. See also *Atkinson v. Railroad Company*, *supra*. In this case, *Ranney, J.*, thus expounds the constitution: "These provisions of the constitution are too explicit to admit of the least doubt that they were intended to disable the General Assembly from either creating corporations, or conferring upon them corporate powers, by *special acts* of legislation. It was intended to correct an existing evil, and to inaugurate the policy of placing all corporations of the same kind upon a perfect equality as to all future grants of power; of making such law applicable to all parts of the State, and thereby securing the vigilance and attention of its whole representation; and finally, of making all judicial construction of their powers, or the restrictions imposed upon them, equally applicable to all corporations of the same class. We must give such a construction to the constitution as will preserve its leading objects intact." *Supra*, sec. 20.

special act, and one which undertook to confer *corporate powers*.¹

§ 25. A constitutional provision that two-thirds of the general assembly "shall be requisite to *every* bill creating, continuing, altering, or renewing *any body politic or corporate*," was held by a majority of the court of errors, reversing the majority view of the supreme court in the same case, to extend to *public* and *municipal*, as well as private, corporations.²

¹ Commercial National Bank v. City of Iola, U. S. Cir. Court, June, 1878, reported in 2 Dillon Cir. C. R. In this case the Circuit Judge, delivering the opinion of the court, and referring to the opinion of *Ranney*, J., quoted in the last note, observed: "One of the objects of the constitutional provision in Kansas, as well as in Ohio, was to cut up by the roots the mischief of special legislation, particularly in respect to corporations, both public and private. This object would be defeated if the special act relating to the city of Iola could stand. If under the doctrine of *Butz v. Muscatine*, 8 Wall. 575, this court is not absolutely bound, in this class of cases, to follow the interpretation of the State constitution given by its highest court, yet it seems that it ought to follow it where it appears to rest upon solid grounds, and was made in cases and in respect to questions where there was nothing to warp the judgment of its judges, and where the interpretation was settled or had been declared at the time the act in controversy was passed. In the latest case on this subject, decided by the Supreme Court of the United States, it is not denied that the Supreme Court of a State is the appointed expositor of its constitution and laws and that the Federal courts will adopt as rules for their own judgments the decisions of the highest courts of the State "respecting local questions peculiar to itself, or respecting the construction of its own constitution and laws." It only denies the binding force of State adjudications which rest upon the general principles of law, and not upon the meaning of special constitutional or legislative provisions. *Olcutt v. Supervisors*, U. S. Supreme Court, Dec. Term, 1872. I think the present case is one in which it is the duty of this court to follow the decisions of the State Supreme Court; and so far as my judgment rests upon the special provisions of the constitution above referred to, I place it upon the State adjudications without an inquiry into their soundness."

The bonds in this case were held invalid mainly on the ground that they were not issued for a public purpose. *Post*, sec. 105 b; also chap. XIV. on Contracts.

² *Purdy v. People*, 4 Hill (N. Y.) 384, 1842; reversing 2 Hill, 81. What is an *alteration* within this provision: *Corning v. Green*, 23 Barb. 38; *Smith v. Helmer*, 7 Barb. 416; *Morris v. People*, 8 Denio, 381. Where a constitution requires that acts of incorporation shall have "the assent of

§ 26. Under a constitution which provides that "in all cases where *a general law* can be made applicable, no special law shall be enacted," the better view is, that it is for the *legislature* to determine whether their purpose can or cannot be expediently effected by a general law, and a special act, as, for example, one providing for the location of the county seat of a specified county, will not be held invalid by the courts.¹

§ 27. The constitutions of several of the states contain, substantially, this provision, derived from the constitution of New York: "It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to *restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit*, so as to prevent abuses in assessments, and in contracting debts by such municipal corporations." This obviously enjoins upon the legislature the duty of providing suitable and proper restrictions upon the enumerated powers, but in what these restrictions shall consist, and how they shall be imposed, are subjects left to the discretion or sense of duty of the legislative department, with the exercise of which the courts cannot interfere.² The Supreme

at least two-thirds of each house," the word *house* means the members present doing business—these being a quorum—and not a majority of all the members elected. *Southworth v. Railroad Co.*, 2 Mich. 287.

¹ *State v. Johnson*, 1 Kansas, 178, 1862; *contra, ex parte Pritz*, 9 Iowa, 30, 1859, where a special act amending the charter of a city was held invalid because all such laws were, by the constitution of the state, required to be, and could be, made general. *Von Phul v. Hammer*, 29 Iowa, 222. It is for the legislature, and not the courts, to determine when a general law can be made applicable. *Gentile v. State*, 29 Ind. 409, overruling *Thomas v. Board of Commissioners*, 5 Ind. 4; *Longworth's Executors v. Evansville*, 32 Ind. 322; *Cooley Const. Lim.* 129, note; *State v. County Court*, 50 Mo. 317, 1872; *Murdock v. Woodson*, 2 Dillon C. C. 1873.

² New York constitution 1846, art. VIII. sec. 9; Wisconsin constitution 1848, art. XI. sec. 3; Michigan constitution 1850, art. XII. sec. 13; Oregon constitution 1857, art. XI. sec. 5; Kansas constitution 1859, art. XII. sec. 5; see *Paine v. Spratley*, 5 Kansas, 525; Nevada constitution 1864, art. VIII. sec. 8; Nebraska constitution, art. VIII. sec. 4; California constitution 1849, sec. 37; Ohio constitution 1851, art. XIII. sec. 6. See, also, chapters relating to Contracts and Taxation, *post*.

³ The failure of the legislature to perform the duty relative to restrict-

Court of Wisconsin, in the case cited in the note, holds, to some extent, a contrary view, but its judgment was, in effect, although not in terms, overruled by the Supreme Court of the United States, and in its full extent is not in accord with the view elsewhere taken in the state courts.¹

§ 28. Many of the state constitutions contain, in substance, a provision that *no legislative act shall embrace more than one object*, to be expressed in *its title*. This provision has been frequently construed to require only the general or ultimate object to be stated in the title, and not the details by which the object is to be attained. Any pro-

ing the power of taxation, &c., enjoined by the constitutional provision above cited, "may," says *Ranney, J.*, in *Hill v. Higdon*, 5 Ohio St. 248, "be of very serious import, but lays no foundation for *judicial* correction." See *Maloy v. Marietta*, 11 Ohio St. 636, 638, where this view is left open, but holding that the legislature alone has the power to determine the *mode* and *measure* of the restriction to be imposed. It was also left open in the *People v. Mahaney*, 13 Mich. 481, but this case illustrates what is a sufficient *restriction* on the power of taxation to meet the constitutional requirement. See also *Cooley Const. Lim.* 518; *Railroad Co. v. Connelly*, 10 Ohio St. 165. To the effect that the constitutional provision quoted in the text does not take away, but recognizes, the *discretion* of the legislature in conferring powers of the enumerated character upon municipal corporations, and that such discretion is not reviewable by the courts, see *Bank of Rome v. Rome*, 18 N. Y. 38, 1858; *Benson v. Mayor, &c. of Albany*, 24 Barb. 248, 1857; *Clarke v. Rochester*, *Ib.* 446; *Grant v. Courter*, *Ib.* 232.

¹ *Foster v. Kenosha*, 12 Wis. 616, 1860. The legislature cannot, consistently with this restriction, confer upon a municipal corporation an unlimited power to levy taxes and raise money for extra municipal purposes, such as aiding railroad companies, and an amendment to the charter of a city authorizing its council "to levy and collect special taxes for *any* purpose (aside from what may be specially provided for in the city charter), which may be considered essential to promote or secure the common interests of the city, or borrow, on the corporate credit of the city, *any* sum of money at a rate of interest not exceeding ten per cent." on obtaining the previous sanction of a majority of the voters of the city, is void, and the requirement of the sanction of the voters is not a restriction on the power to levy taxes or contract debts, within the meaning of the constitution, the court being of opinion that the duty of imposing the limitation rests on the legislature. *Ib.* But see *Campbell v. Kenosha*, 5 Wall. 194, 1866; *City v. Lamson*, 9 Wall. 477, 1869; and the authorities cited in the last note. See *Rogan v. Watertown*, 30 Wis. 259, 1872, as to *loaning credit*.

Other restrictions upon the power to contract debts: see chapters on Charters and Contracts, *post*.

vision calculated to carry the declared object into effect is unobjectionable, although not specially indicated in the title. Thus, where a constitution provides that no bill or act shall pass containing any matter different from what is expressed in the title thereof, an act, the title of which declares it to be *for the better regulation of a certain town* (naming it), *or to amend or enlarge the powers of the corporation thereof*, is sufficient, without enumerating the particulars in which the powers are enlarged or extended.¹ So a provision in an act entitled merely, "An act to amend the act incorporating the city of M.," extending the city limits, does not conflict with the constitutional requirement that "every law shall embrace but one object, which shall be expressed in its title."²

¹ *Green v. Mayor*, R. M. Charl. (Geo.) 368, 1832, *per Law, J.*; *Mayor v. State*, 4 Geo. 26; *Hill v. Decatur*, 22 Geo. 203.

² *Morford v. Unger*, 8 Iowa, 82, 1859; *Davis v. Woolnough* (act establishing city court), 9 *Ib.* 104. S. P. *St. Paul v. Coulter*, 12 Minn. 41, 50, 1866. In determining whether a law be in conflict with the provision of the constitution, the unity of the object is to be looked for in the ultimate end to be attained, and not in the details leading to that end. *State, &c. v. Co. Judge*, 2 Iowa, 280; *People v. Mahaney*, 13 Mich. 481, 1865; *People v. Hurlburt*, 24 Mich. 44, 1871. Construction of similar constitutional provision: *Armault v. New Orleans*, 11 La. An. 54; *Kathman v. New Orleans*, *Ib.* 145; *People v. Mellen*, 32 Ill. 181; *Railroad Co. v. Gregory*, 15 Ill. 21; *Davis v. State* (inspection act for Baltimore), 7 Md. 151; *Annapolis v. State*, 30 Md. 212; *Lafou v. Dufrocq*, 6 La. An. 350; *Ottawa v. People*, 48 Ill. 233, 1868; *Miles v. Charleton*, 29 Wis. 400, 1872; *Murdock v. Woodson*, 2 Dillon C. C. R. 1878; *Hubert v. People*, 49 N. Y. 132, 1872.

CHAPTER IV.

PUBLIC AND PRIVATE CORPORATIONS DISTINGUISHED—
LEGISLATIVE AUTHORITY AND ITS LIMITATIONS.

§ 29. *A fundamental division of corporations heretofore adverted to, is into public and private.*¹ The import-

¹ *Ante*, chapter II. In *Milne v. Williams*, 11 Ire. (Nor. Car.) Law, 558, 1854, *Pearson*, J., commenting on the common divisions of corporations, says: "The purpose in making all corporations is the accomplishment of some *public good*. Hence, the division into public and private has a tendency to confuse and lead to error in investigation; for, unless the public are to be benefited, it is no more lawful to confer 'exclusive rights and privileges' upon an artificial body, than upon a private citizen. The substantial distinction is this: Some corporations are created by the *mere will* of the legislature, there being no other *party interested or concerned*. To this body a portion of the power of the legislature is delegated, to be exercised for the public good, and subject at all times to be modified, changed, or annulled. Other corporations are the result of *contract*. The legislature is not the only party interested; for, although it has a public purpose to be accomplished, it chooses to do it by the instrumentality of a *second party*. These two make a contract. The expectation of benefit to the public is the moving consideration on one side; that of expected remuneration for the outlay is the consideration on the other. *It is a contract*, and, therefore, cannot be modified, changed, or annulled without the consent of both parties. Counties are an instance of the former, railroad and turnpike companies of the latter, class of corporations." This recognizes the substantial difference between the two classes of corporations, and is, in effect, a criticism upon the names by which they are distinguished.

According to the view of the supreme court of California, corporations should be divided into three classes, to wit: Public municipal corporations, the object of which is to promote the public interest; corporations technically private, but of a *quasi* public character, having in view some public enterprise in which the public interests are involved, such as railroad, turnpike, and canal companies; and corporations strictly private. *Miner's Ditch Company v. Zellerbach*, 37 Cal. 543, 1869. The opinion of *Sawyer*, C. J., in this case, is able and instructive. The author prefers the ordinary division of corporations into public (which includes municipal) and private. See *Foster v. Fowler*, 60 Pa. St. 27, 1868, in which a company created to supply a city with water was held to be a public, as distinguished from a private corporation.

ance of this distinction cannot be too much emphasized, since upon it are based the legal principles which so broadly distinguish the two classes of corporations. With private corporations the present work has no other concern than to point out wherein they differ from those which are public. Both classes are alike created by the legislature, and in the same way—by special charter or under general incorporation acts. *Private corporations* are created for private, as distinguished from purely public purposes, and they are not, in contemplation of law, public because it may have been supposed by the legislature that their establishment would promote, either directly or consequentially, the public interest. They cannot be compelled to accept a charter or incorporating act. The assent of the corporation is necessary to make the incorporating statute operative. But when assented to, the legislative grant is irrevocable, and it cannot, without the consent of the corporation, be impaired or destroyed by any subsequent act of legislation, unless the right to do so was reserved at the time. The celebrated *Dartmouth College Case*, by its construction of the federal constitution, incorporated, wisely or otherwise, into American jurisprudence, the principle which has been attended with such important practical consequences, namely, that privileges and franchises granted by legislative act to a private corporation, when accepted, constitute a *contract* within the meaning of the clause of the constitution which secures the inviolability of contracts by declaring that no state shall pass any law impairing their obligation; and hence a law materially altering the charter of such a corporation is unconstitutional, unless the power to alter it was reserved when the grant was made.

§ 30. *Public corporations* are called into being at the pleasure of the state, and while the state may, it need not, obtain the consent of the people of the locality to be affected. The charter or incorporating act of a municipal corporation is in no sense a *contract* between the state and the corporation, although, as we shall presently see, vested rights in favor of third persons, if not, indeed, in favor of the corporation, may arise under it. Public corporations within the meaning of this rule are such as are established for public

purposes exclusively—that is, for purposes connected with the administration of civil or local government—and corporations are public only when, in the language of Chief Justice *Marshall*, “*the whole interests and franchises are the exclusive property and domain of the government itself,*” such as *quasi* corporations (so called), counties and towns or cities upon which are conferred the powers of local administration. With the exception of certain constitutional limitations presently to be noticed, the power of the legislature over such corporations is supreme and transcendent: it may erect, change, divide, and even abolish them, at pleasure, as it deems the public good to require.¹

¹ *Dartmouth College v. Woodward*, 4 Wheat. 518, 1819; *Allen v. McKean*, 1 Sumner, 276, 1833 (the Bowdoin College Case elaborately considered by *Story*, J.); *People v. Morris*, 18 Wend. 325, 1835. In this case the defendant insisted that the rights and privileges conferred upon the village of Ogdensburg by the act incorporating it were *vested rights*, and could not be impaired by subsequent legislation. But, said *Nelson*, J., with his usual clearness: “It is an unsound and even absurd proposition that political power conferred by the legislature can become a vested right *as against the government* in any individual or body of men.” *S. P. Penobscot Boom Corporation v. Lawson*, 16 Maine, 224; *Yarmouth v. North Yarmouth*, 34 Maine, 411, 1852; *Story Com. Const.*, secs. 1385, 1388; *North Yarmouth v. Skillings*, 45 Maine, 133, 1858; *Girard v. Philadelphia*, 7 Wall. 1, 1863; *ante*, § 9; *Jersey City v. Railroad Co.*, 20 N. J. Eq. 360. “A municipal corporation, in which is vested some portion of the administration of the government, may be changed at the will of the legislature. Such is a public corporation, used for public purposes.” *Per McLean*, J., in *State Bank v. Knoop*, 16 How. U. S. 369, 380, 1853. “Public or municipal corporations are established for the local government of towns or particular districts. The special powers conferred upon them are not vested rights as against the state, but, being wholly political, exist only during the will of the general legislature; otherwise, there would be numberless petty governments existing within the state and forming part of it, but independent of the control of the sovereign power. Such powers may at any time be repealed or abrogated by the legislature, either by a general law operating upon the whole state, or by a special act altering the powers of the corporation.” *Sloan v. State* (implied modification of charter as to vending liquor by subsequent general law), 8 Blackf. (Ind.) 361, 1847, *per Smith*, J.; approving *People v. Morris*, 18 Wend. 325; *Armstrong v. Commissioners* (as to removal of county seat), 4 Blackf. (Ind.) 208, 1836; *Post*, sec. 35.

In the recent case of the *United States v. The Baltimore & Ohio Railroad Company*, decided by the United States Supreme Court, December Term, 1872, in which it was held that the general government could not tax the income or property of the City of Baltimore under the Internal

And it may be here observed that the extent of the legislative control over public or municipal corporations is not impaired by the circumstance that the charter is granted in the same act that creates a private corporation, whose rights cannot be changed without their consent.¹ Where, in in-

Revenue Act (*Post*, sec. 615 *a*), the court discuss and examine the nature of municipal corporations and the relation they sustain to the state, of which they are treated as arms or agencies. The court say: "A municipal corporation like the City of Baltimore is a representative not only of the state, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the state. The state may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the state at large. It may enlarge or contract its powers or destroy its existence. As a portion of the state, in the exercise of a limited portion of the powers of the state, its revenues, like those of the state, are not subject to taxation." *Post*, secs. 64, 614.

As to extent of *legislative control*, and the distinction between *public and private* corporations, see, also, *People v. Wren* (division of a county), 4 Scam. (Ill.) 273; *Coles v. Madison County*, Breese (Ill.) 120; *Bush v. Shipman*, 4 Scam. (Ill.) 190; *Holliday v. People*, 5 Gilm. (Ill.) 216; *Richland County v. Lawrence County*, 12 Ill. 8; *Trustees, &c. v. Tatman*, 13 Ill. 30; *Gutzwiller v. People*, 14 Ill. 142; *State v. Mayor, R. M. Charl.* (Geo.) 250; *State, &c. v. St. Louis County Court*, 34 Mo. 546; *Purdy v. People*, 4 Hill (N. Y.) 385; *Morey v. Newfane*, 8 Barb. 645; *Lloyd v. Mayor, &c. of New York*, 5 N. Y. (1 Seld.) 369; *Lowler v. Same*, 7 Abb. Pr. R. 248; *Green v. Same*, 5 *Ib.* 503; *Aurora v. West*, 9 Ind. 74; *Plymouth v. Jackson*, 15 Pa. St. 44; *Louisville v. Commonwealth*, 1 Duvall (Ky.) 295; *O'Hara v. Portland*, 3 Oregon, 525; *Gray v. Brooklyn*, 10 Abb. (N. Y.) Pr. Rep. N. S. 186; *State v. Hundelhausen*, 26 Wis. 432, 1870; *Tinsman v. Railroad Company*, 2 Dutch. (N. J.) 148; *Marietta v. Fearing*, 4 Ohio, 427; *Richmond v. Richmond, &c. R. R. Co.*, 21 Gratt. (Va.) 604, 1872; *State v. Mayor, &c.* 24 Ala. 701; *Governor v. McEwen*, 5 Humph. (Tenn.) 241; *Grogan v. San Francisco*, 18 Cal. 590; *Darlington v. Mayor, &c. of New York*, 31 N. Y. 164; *Savings Fund Society v. Philadelphia*, 31 Pa. St. 175, 185; *Philadelphia v. Field*, 58 Pa. St. 320; *Erie v. Canal Company*, 59 Pa. St. 174; *Dunsmore's Appeal*, 52 Pa. St. 374; *Blanding v. Burr*, 13 Cal. 343, 1859; *People v. Hill*, 7 Cal. 97, 1857; *Burns v. Clarion County*, 62 Pa. St. 422, 1869; *Durach's Appeal*, *Ib.* 491; *New Orleans v. Hoyle*, 23 La. An. 740.

This subject is discussed in an interesting manner by *Sharswood, J.*, in his learned judgment, in *Philadelphia v. Fox*, 64 Pa. St. 169, 1870. The doctrine is here laid down that since the legislature cannot alienate any part of its legislative power, it cannot therefore by legislative act or contract invest any municipal corporation with an irrevocable franchise of government over any part of its territory. *Ib.* 181; *Post*, secs. 37, 437.

¹ *Patterson v. Society, &c.*, 4 Zab. (N. J.) 385, 1854. See, also, *Baltimore v. Board of Police*, 15 Md. 376, 1859.

incorporating a gas company, the legislature reserved the power to alter, modify, or repeal the charter, it is competent for it, by subsequent legislation, to subject the company to supervision and control, and to confer the power upon the municipal corporation in which the works of the company are erected to regulate the price of gas, and ordinances duly passed in pursuance of such power are binding upon the company.¹

§ 31. Some of the leading *differences* heretofore generally recognized *between public and private corporations* are well illustrated and clearly stated in a case decided in New Jersey. In an action by a riparian proprietor against a *canal company*, for obstructing a watercourse, the company insisted that it was not liable, because the work was authorized by its charter; that the acts it did were legal; that the injury complained of was consequential; that the enterprise was a public work, designed for public purposes, and that the company, in executing it, acted as the public agents of the state. But the court held that the company was not a public corporation. On this point *Nevius, J.*, the organ of the court, observed: "Public corporations are political corporations, or such as are founded wholly for public purposes, and the *whole* interest in which is in the public. The fact of the public having an interest in the works or the property or the object of a corporation, does not make it a public corporation. All corporations, whether public or private, are, in contemplation of law, founded upon the principle that they will promote the interest or convenience of the public. A bank is a private corporation, yet it is, in the eye of the law, designed for public benefit. A turnpike or a canal company is a private company, yet the public have an interest in the use of their works, subject to such tolls and restrictions as the charter has imposed. The interest, therefore, which the public may have in the property or in the objects of a corporation, whether direct or incidental (unless it has the whole interest), does not determine its char-

¹ *State v. Cincinnati Gas Company*, 18 Ohio St. 262, 1868. See, also, *Norwich Gaslight Company v. Norwich City Gas Company*, 25 Conn. 19, 1856; *State v. Milwaukee Gas Light Company*, 29 Wis. 454, 1872.

acter as a public or private corporation. In the present case, whatever may have been the objects of the corporation, whether to erect a public navigable highway, or to improve the navigation of the Raritan river, or whether the public have a right to the use and enjoyment of these improvements, when made, or not, the company are essentially a private company, and are not [in the sense which will confer the state's exemption from liability,] the agents of the state. Their works are not constructed by the requirement of the state, nor at the expense of the state, nor does the stock belong to the state, nor is the state answerable for the lands or materials used in the construction of these works, or responsible for the debts of the company, or for injuries committed by them in the execution of their work. The state could not compel the company to construct this canal or improve the navigation of the river; it has permitted them to do so at their own request. The company might have abandoned the work whenever they saw fit; they may now abandon it without responsibility to the state. The corporation itself, the property of the corporation, the object of the corporation are essentially private, subject only to public use, under their own restrictions, and from which use, the company are to derive the profits." ¹

¹ *Nevius, J., Ten Eyck v. Canal Company*, 3 Harrison (N. J.) 200, 203, 1841; approved, *Hanson v. Vernon*, 27 Iowa, 28, 53, 1869.

In an elaborate and well-considered opinion, in which the court of appeals of Maryland held the regents of the university of that state to be a *private* corporation, though its ends were public, *Buchanan, C. J.*, delivering the judgment of the court, thus *defines a public corporation*: "A public corporation is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the government subject to the control of the legislature and its members, officers of the government, for the administration or discharge of public duties, as in the cases of cities, towns, &c.; so where a bank is created by the government for its own uses, and the stock belongs exclusively to the government, it is a public corporation; and so of a hospital created and endowed by a government for general purposes of charity." *Regents of University v. Williams*, 9 Gill & Johns. (Md.) 365, 397, 1838. See, also, *Norris v. Trustees*, 7 Gill & Johns. 7.

Speaking of *public corporations*, and the relations they sustain to the state, the supreme court of Louisiana uses this language: "The government of cities and towns, like that of the police jury of parishes (counties), forms

§ 32. The adjudged cases present some contrariety of opinion respecting the *scope of legislative authority* over municipal corporations, or rather, respecting the question how far such corporations, viewed as legal personalities, are within the operation or protection of the usual constitutional restraints upon legislative power. The present chapter will be devoted to a consideration of this subject, and it can, perhaps, be most satisfactorily presented by viewing it in the light of actual adjudications, accompanied with such observations and comment as seem to be suitable and necessary. The extent of the authority of the legislature over public corporations is strikingly illustrated by an important case decided by the court of appeals in the state of Maryland. The legislature in incorporating a railroad company made it its duty to locate its road through three towns specially named, and provided, that if it failed to do so, "then and in that case said company shall forfeit \$1,000,000 to the state of Maryland *for the use of Washington county.*" The action was instituted for the benefit of the

one of the subdivisions of the internal administration of the state, and is absolutely under the control of the legislature. The laws which establish and regulate municipal corporations are not contracts, but ordinary acts of legislation, and the powers they confer are nothing more than mandates of the sovereign power, and those laws may be repealed or altered at the will of the legislature, except so far as the repeal or change may affect the rights of third persons acquired under them." *Police Jury v. Shreveport* (repeal of corporation ferry right), 5 La. An. 661, 1850; *State Bank v. Navigation Company* (construction of charter), 8 *Id.* 294, 1848; *Reynolds v. Baldwin*, 1 *Id.* 162; *Haynes v. Municipality*, 5 *Id.* 760; *Edgerton v. Municipality*, 1 *Id.* 435; *Board v. Municipality*, 6 *Id.* 21, 1851.

In the opinion of the supreme court of the United States, holding that the legislature of a state might lawfully repeal or discontinue a ferry franchise granted to a municipal corporation, it is remarked that towns and cities, "which are public municipal and political bodies, are incorporated for public, and not private, objects. They are allowed to hold privileges or property only for public purposes. The members are not shareholders, nor joint partners in any corporate estate, which they can sell or devise to others, or which can be attached or levied on for their debts. Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions named, and, therefore, to be considered as not violated by subsequent legislative changes." *Per Woodbury, J.*, in *East Hartford v. Hartford Company*, 10 How. (U. S.) 511, 531, 1850. See, also, *Trustees v. Tatman*, 13 Ill. 30; *New Orleans v. Hoyle*, 23 La. An. 740.

county to recover the one million dollars, it being alleged that the defendant had not constructed its road in the manner required. The defendant pleaded that since the last continuance the legislature had passed an act repealing that portion of the charter of the company requiring it to build its road through said towns, and *specially remitting and releasing the forfeiture of \$1,000,000*. The leading question, which was argued on either side by distinguished counsel, was, whether the provision in favor of the county was one of *contract* (the railroad company having assented to the act), and hence claimed to be inviolable by legislative interference, or whether it was one of *penalty*, and therefore subject to unlimited legislative control. The court held the latter view to be the true one, and that the defendant was not liable. The court also expressed the opinion that if it should be treated as a contract made by the state, yet it was a contract for the benefit of one of its counties, to which the money, if collected, would belong, in its political and public capacity, as part of the state, and that such a contract did not come within the meaning of that provision of the national constitution which prohibits a state from impairing the obligation of a contract, so as to prevent the legislature from releasing it at pleasure, or discontinuing an action brought for its enforcement in the name of the state.¹

§ 33. Questions have arisen under special constitutional provisions respecting the authority of the legislature over *municipal offices and officers*. And here it is important to bear in mind the distinction between state officers—that is, officers whose duties concern the state at large, or the general public, although exercised within defined territorial limits—and municipal officers, whose functions relate exclusively to the particular municipality. The administra-

¹ *State v. Railroad Co.* 12 Gill & Johns. (Md.) 399, 1842; affirmed on error, 8 How. (U. S.) 534, 1844.

A public corporation has no vested right to *fines* directed to be paid to it, and the legislature may release them. No contract in such cases is thereby violated, for none exists. *Coles v. Madison County*, Breese (Ill.) 115; *Holliday v. People*, 5 Gilm. (Ill.) 216; *Conner v. Bent*, 1 Mo. 235; *Rankin v. Beaird*, Breese (Ill.) 123. Effect of executive *pardon* on *fines* going to county, *Holliday v. People*, 5 Gilm. (Ill.) 216.

tion of justice, the preservation of the public peace, and the like, although confided to local agencies, are essentially matters of public concern; while the enforcement of municipal by-laws proper, the establishment of gas works, of water works, the construction of sewers, and the like, are matters which pertain to the municipality, as distinguished from the state at large.¹ The constitution of Michigan enjoined upon the legislature to “provide for the incorporation and organization of cities and villages;” gave it authority to confer upon them such powers of a local legislative and administrative character as it should deem proper, and contained the further provision that “judicial officers of cities and villages shall be elected, and *all other* [municipal] *officers* shall be elected, or appointed, at such time and in such manner as the legislature may direct;” and it was held by the Supreme Court of the state, in a cause that underwent great consideration, and in which the judges delivered separate opinions, that while the legislature was left free to appoint officers not municipal, such, for example, as a board of police commissioners in and for a city, yet that it was restrained by the above-mentioned provisions, especially by the one last quoted, from itself directly appointing municipal officers, whose duties and authority were plainly and exclusively local, such as the board of water commissioners and board of sewer commissioners for a particular city.’

¹ *People v. Hurlburt*, 24 Mich. 44, 1871. The distinction mentioned in the text is there accurately drawn, and clearly stated and illustrated in the admirable opinion of *Campbell*, C. J. *Ante*, secs. 10, 11. See chapter on Corporate Officers, *post*, secs. 772, 802.

² *People v. Hurlburt*, *supra*, distinguished from *People v. Mahaney*, 18 Mich. 481; *ante*, sec. 9, and notes. So, under the constitution of Kentucky, which contains a provision that “officers of towns and cities shall be *elected* for such terms, and in such manner, and with such qualifications, as may be prescribed by law,” and “shall reside within their respective districts,” it was held that the legislature could not authorize the governor to appoint municipal officers, since the constitution requires that they shall be elected by the voters of the town or city (*Speed v. Crawford*, 8 Met. [Ky.] 207, 1860), but it was also likewise held that it was within the power of the legislature to pass an act depriving the mayor and council of a designated city of the power to elect the *police* force thereof, and establishing, instead, a *board of police* for the city and the county in which the city was situate, to be elected

§ 34. And it has elsewhere been several times determined that the legislature may, unless specially restricted in the constitution, take from a municipal corporation its charter *powers respecting the police* and their appointment, and by statute itself directly provide for a permanent police for the corporation, under the control of a board of police, not appointed or elected by the corporate authorities, but consisting of commissioners named and appointed by the legislature. And a provision in such a law, transferring to such commissioners, for the purposes of the new police, the use of the police telegraph, station-houses, watch-boxes, &c., provided by the corporation, is valid, since it only takes city property dedicated to a particular use, and applies it to the same purpose, changing only the agency by which the use is directed; the property is still the city's.

by the qualified voters of the city and county, and that this board, thus elected, should select and enroll the permanent police force of the city, which, it was provided, should be taxed to pay them. *Police Commissioners v. Louisville*, 8 Bush (Ky.) 597, 1868. See *Richmond Mayoralty Case*, 19 Gratt. (Va.) 678.

¹ *Baltimore v. Board of Police* (affirming validity to the Baltimore Police Bill), 15 Md. 376, 1859. There is nothing in the maxim that "Taxation and representation go together," that can preclude the legislature from establishing, in a city, a metropolitan police board, with power to estimate the expenses of the police, and compelling the city authorities to raise, by taxation, the amount so estimated. Every city is represented in the state legislature, and it is for that body to determine how much power shall be conferred by the municipal charters which it grants. *People v. Mahaney*, 13 Mich. 481; see, also, same principle, *People v. Draper*, 15 N. Y. 532, 1857, where the act to establish the metropolitan police district was held constitutional; *Police Commissioners v. Louisville*, 8 Bush 597; *Diamond v. Cain*, 21 La. An. 809, 1869; *State v. Leovy*, *Id.* 538. The cases concur in holding that police officers are, in fact, state officers, and not municipal, although a particular city or town be taxed to pay them. *Post*, sec. 778. An act which makes the mayor and aldermen of a corporation commissioners of the court-house and jail may be repealed by the legislature, and these buildings placed under the control of county or other officers. *State v. Mayor, R. M. Charlt. (Geo.)* 250; see, also, *State v. Dews*, *Id.* 397. A grant to a city to aid in building court-house, and for educational purposes, is subject, until executed, to legislative resumption and control. *Bass v. Fontleroy*, 11 Texas, 698.

The management and mode of electing trustees of an *incorporated academy*, which is endowed *entirely by the state*, may be changed by the legislature at its pleasure. *Dart v. Houston*, 22 Geo. 506; see, also, *Uni-*

So in the absence of special restriction it is constitutionally competent, likewise, to the legislature of a state to direct that the *county* shall pay a portion of the expenses of a police force in a city situated wholly within, and forming part of, the county. It may even direct a county to appropriate part of its revenue already collected in this way, since such legislation is not unconstitutional, as being retrospective in its operation, or as taking away vested rights, or impairing the obligation of contracts, or violating the principles of taxation. As moneys acquired by taxation are not strictly the private property of the county, such legislation is not the application of private property to public use without compensation, since the police board, by virtue of the act creating it, was an agency of the state government and performed public duties.¹

§ 35. The legitimate authority of the legislature over municipal corporations extends to making provisions concerning their *funds and revenues*, and the authority is not abridged because the purpose to which the revenue is to be

versity of North Carolina *v.* Maultsby, 8 Ire. Eq. 257; University of Alabama *v.* Winston, 5 Stew. & Port. 17; Louisville *v.* University of Louisville, 15 B. Mon. 645; Visitors, &c. *v.* State, 15 Md. 330.

¹ State *ex rel.* St. Louis Police Commissioners *v.* St. Louis County Court (mandamus), 84 Mo. 546, 1864; *contra*, Mayor, &c. *v.* Tows, 5 Sneed (Tenn.) 186. The view of the Supreme Court of Missouri is undoubtedly the correct one. Approved, St. Louis *v.* Shields, Supreme Court, Missouri, March, 1873.

The maintenance of a police force may be committed to the corporate authorities of a municipality, and if there are no special constitutional restrictions on the power of the legislature, it may authorize the assessment of a tax upon the keepers of saloons and restaurants in the municipality for the purpose of maintaining such police force therein, to be levied and collected as other taxes. Durach's Appeal, 62 Pa. St. 491, 1869; *Post*, secs 592, 594, 632; Railroad Company *v.* Adler, 56 Ill. 344, 1870.

School districts being public corporations, under legislative control, a law providing that school debts might be paid in bills of the state bank of the state, is valid as against the objection that the legislature had no power to direct that anything except gold and silver should be received in payment of debts. Bush *v.* Shipman, 4 Scam. (Ill.) 190.

A municipal corporation may constitutionally be exempted from prospective liability for nonfeasance of its officers or liability for torts. Gray *v.* Brooklyn, 10 Abb. Pr. R. N. S. 186; *post*, sec. 760.

appropriated is specified in the charter, and the ground of the doctrine is, that such corporations have no vested rights in powers conferred upon them for civil, political, or administrative purposes. Thus, the legislature may repeal the power it had given to cities to grant licenses for the sale of intoxicating liquors, although the money to be derived from the sale of such licenses was directed to be appropriated to the support of paupers within the city.¹ Such an authority, it was remarked, "gives the city no more a vested right to issue licenses, because the legislature specified the objects to which the money should be applied, than if it had been put into the general fund of the city."²

§ 36. Legislative acts respecting municipal corporations not being in the nature of contracts, the provisions thereof may be changed at pleasure where the *constitutional rights of creditors* and others are not invaded. By act of the leg-

¹ Gutzweller v. People, 14 Ill. 142, 1852. *Ante*, sec. 30, note.

² Gutzweller v. People, 14 Ill. 142, 1852, *per* Caton, J. See, also, Richland Co. v. Lawrence Co., 12 Ill. 1, 1850; People v. Power, 25 Ill. 187; Richmond v. Richmond, &c. R. R. Co. 21 Gratt. (Va.) 604, 1872, holding that the state may exempt property from municipal taxation. By the charter of a municipal corporation there was granted to it sole power to grant licenses to sell spirituous liquors within its limits, and to appropriate the money arising therefrom to city purposes. Subsequently the legislature passed an act directing the money thus arising to be paid by the corporation to an academy located within the town. The municipal corporation refused to pay over to the academy an amount received for licenses after the passage of the last named act, and the academy brought an action to recover it. The court held the subsequent act to be unconstitutional, and that the town was not liable. The court were of opinion, that, by its charter, the town had a vested right in the profits arising from licenses. It admitted that the legislature might altogether take away from the town the power to grant licenses; but if it allowed the power to remain, it denied the right of the legislature "to make a different disposition of the funds arising from such licenses, from that contained in the charter, unless with the consent of the corporation." Trustees of Aberdeen Academy v. Aberdeen, 13 Sm. & Marsh. (Miss.) 645, 1850. See, also, Aberdeen v. Sanderson, 8 Ib. 663. The doctrine that the town corporation had a vested right in profits arising from licenses, cannot, we think, be sustained, and is not in harmony with the decisions elsewhere.

County and township funds are under legislative control. County v. State, 11 Ill. 202; County v. County, 12 Ill. 1; Dennis v. Maynard, 15 Ill. 477; Love v. Schenck, 12 Ire. Law, 304; Love v. Ramsour, *Ib.* 828.

islature the separate city of Lafayette was added to and incorporated with the city of New Orleans, with a provision that the added district, which was *less in debt* than the city of New Orleans, should be charged only with its own debts; and by a *subsequent* act of the legislature it was provided that taxes should be equal and uniform throughout the entire limits of the city, the effect of which was to increase the amount of taxes to be raised within that portion of the corporation which was formerly the city of Lafayette. A bill was filed by residents and property owners of the annexed district to enjoin the collection of the excess of taxes beyond the amount fixed by the act incorporating the annexed district into the "old city," claiming that the act was a contract, and the levy of taxes under the latter act, so far as regards debts due antecedently to the annexation, violated the vested rights of the inhabitants of the annexed district. The Supreme Court, on the ground that public corporations are wholly under the control of the legislature, which has the power to provide in what manner taxes shall be levied for their support, and how their debts shall be paid on their dissolution, held the act authorizing increased taxation to be valid, and dismissed the bill.¹

§ 37. The power of the legislature to alter and abolish municipal corporations, to erect new corporations in the place of the old, to add to the old, or to carve out of the old a new corporation, or the power to divide and dispose of the property held by such corporations for municipal purposes, is not defeated or affected by the circumstance that the corporation is, by its charter, made the *trustee of a charity*, or of other private rights and interests. Where the legal existence of the municipal trustee is destroyed by legislative act, the Court of Chancery will assume the execution of the trust, and, if necessary, will appoint new trustees to take charge of the property and carry into effect the trust.²

¹ Layton v. New Orleans, 12 La. An. 515, 1857. See, also, Girard v. Philadelphia, 7 Wall. 1, 1868; People v. Hill, 7 Cal. 97, 1857; *post*, chap. VIII; State v. Flanders, 24 La. An. 57.

² Girard v. Philadelphia, 7 Wall. 1, 1868; Philadelphia v. Fox, 64 Pa. St. 169, 1870; Montpelier v. East Montpelier (division of town and contest as to trust property held for the benefit of the inhabitants of the original

§ 38. The supremacy of the legislative authority over municipal corporations is not, however, in all respects, unlimited; but the limitations must be sought either in the national or state constitution, and if not there found, in terms, or by fair implication, they do not exist. In England, it is settled that the crown has no power, without the consent of those to be affected thereby, to alter or abolish municipal charters, or to impose new ones on the corporation. But parliament may create new corporations, or abolish or alter charters, or impose new ones, at its will, and without the consent of the inhabitants. And so may the state legislatures in this country, if there be no special constitutional restriction, as generally there is not, upon the power.¹

§ 39. It may assist to an understanding of the extent of legislative power over municipal corporations proper (incorporated towns and cities) to observe, that these, as ordinarily constituted, possess, according to many courts, a double character—the one *governmental, legislative, or public*; the other, in a sense, *proprietary or private*. The distinction between these, though sometimes difficult to trace, is highly important, and is frequently referred to, particularly in the cases relating to the implied or common law liability of municipal corporations for the negligence of their servants, agents, or officers in the execution of corporate duties and powers. On this distinction, indeed, rests the doctrine of such implied liability.² In its governmental

township), 29 Vermont (3 Wms.) 12, 1856; same controversy at law, 27 Vermont, 704. See *infra*, sec. 47, and chapters on Corporate Property and Remedies against Illegal Corporate Acts, *post*.

¹ St. Louis v. Allen (extension of city limits), 13 Mo. 400, 1850; St. Louis v. Russell, 9 Mo. 508, 1845. It is justly observed, that “Most, if not all, of the leading cases in the books, involving the question of the inviolability of municipal charters, in the *English* courts, arose between the *prerogative of the crown* and the *corporation*. The right or power of *parliament* in England, or of the legislature here, would present (and was decided to present) quite a different question.” *Per Nelson, J.*, in People v. Morris, 13 Wend. 825, 884, 1835; Philadelphia v. Field, 58 Pa. St. 820, 1868.

² *Ante*, secs. 10, 11. “The distinction is well established between the responsibilities of towns and cities for acts done in their *public capacity*, in the discharge of duties imposed on them by the legislature for the public benefit, and for acts done in what may be called their *private character*, in

or public character, the corporation is made, by the state, one of its instruments, or the local depository of certain limited and prescribed political powers, to be exercised for the public good, on behalf of the state, and not for itself. In this respect it is assimilated, in its nature and functions, to a county corporation, which, as we have seen, is purely part of the governmental machinery of the sovereignty which creates it. Over all its civil, political, or governmental powers, the authority of the legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in some peculiar provision of the constitution of the particular state. But in its proprietary or private character, the theory is, that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the particular corporation as a distinct *legal personality*, and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded as *quo ad hoc* a private corporation, or, at least, not public in the sense that the power of the legislature over it is omnipotent.¹

the management of property and rights voluntarily held by them for their own immediate profit or advantage, as a corporation, although inuring, of course, ultimately to the benefit of the public." *Per Gray, J.*, in *Oliver v. Worcester*, 102 Mass. 439, 499, 1869; *S. P. Detroit v. Corey*, 9 Mich. 165, 184, 1861. In the one case, no private action lies unless it be expressly given; in the other, there is an implied or common law liability for the negligence of their officers in the discharge of such duties. In further illustration of this alleged dual character, the reader is referred to the cases cited in the next note. *Post*, §§ 761, 778, 779.

¹ *West. Sav. Fund Soc. v. Philadelphia*, 31 Pa. St. 175; *Ib.* 185; *Bailey v. Mayor, &c. of New York*, 3 Hill, 531; *Small v. Danville*, 51 Maine, 359; *Jones v. New Haven*, 34 Conn. 1; *Western College v. Cleveland*, 12 Ohio St. 375, 1861; *Howe v. New Orleans*, 12 La. An. 481; *Martin v. Mayor, &c.* 1 Hill, 545; *Buttrick v. Lowell*, 1 Allen, 172; *Oliver v. Worcester*, 102 Mass. 489, 1869; *Touchard v. Touchard*, 5 Cal. 306; *Gas Co. v. San Francisco*, 9 Cal. 453; *Commissioners v. Duckett*, 20 Md. 468; *Weet v. Brookport*, 16 N. Y. 161, note; *Louisville v. University of Louisville*, 15 B. Mon. 642; *Louisville v. Commonwealth*, 1 Duvall (Ky.) 295; *Weightman v. Washington*, 1 Black (U. S.) 39, 1861; *Reading v. Commonwealth*, 11 Pa. St. 196, 1849; *Richmond v. Long's Admr.*, 17 Gratt. (Va.) 375; *De Voss v. Richmond*, 18 Gratt. 238; S. C., 7 Am. Law Reg. (N. S.) 589; *Detroit v.*

§ 40. It is, perhaps, at present, impossible to state, with confidence, what *limitations exist upon the power of the legislature* over municipal corporations, as ordinarily constituted. It is practicable only to refer to the leading cases

Corey, 9 Mich. 165, 184, 1861; People v. Hurlburt, 24 Mich. 44, 1871, opinion of Cooley, J. As to what are municipal duties, and what falls within the scope of municipal powers, see United States v. Baltimore & Ohio Railroad Company, decided by the United States Supreme Court, December term, 1872. *Post*, sec. 615 a.

This division of the powers and duties of a municipal corporation into two classes, one public and the other private, is, to our mind, far from satisfactory; and the *private* character thus ascribed to it, difficult exactly to comprehend. In what sense are powers conferred and to be exercised for the good of all the people of the place, private? Wherein do such powers, in their origin or nature, differ from those admitted to be public? Are not all powers conferred upon municipalities, whether many or few, given, and given only, for their better regulation and government, and to promote their welfare as parts of the state at large? The small municipality, with few and simple powers, is no more completely under the supreme dominion of the legislature than the more populous one, requiring for its proper government organs and powers peculiar to itself. Are the latter, therefore, *private*? If so, it must be in a qualified and peculiar sense. *Ante*, p. 97. Contracts in favor of the creditor are protected by the national constitution; but as against a state, what private powers and rights can a municipal corporation be said to have, when it is within the power of the state, which breathed into it the breath of life, utterly to extinguish its existence at pleasure. The distinction originated with the courts, to promote justice and to escape technical difficulties in order to hold such corporations liable to private actions. On this subject, the opinion of Chief Justice Denio, in Darlington v. Mayor, &c., 31 N. Y. 164, 1865, may be read with profit. The Chief Justice there asserts the unlimited power of the legislature over municipal corporations and their property. He maintains that such corporations are altogether public, and all their rights and powers public in their nature, and that their property, though held for income or sale, and unconnected with any use for the purposes of the municipal government, is under the control of the legislature, and not within the provisions of the constitution protecting private property. He denies the correctness of the distinction taken in Bailey v. The Mayor, &c., of New York, 8 Hill, 531, and other cases, between the public and private functions of city governments, and maintains that as respects *the state*, all their powers and functions are public. He affirms that the legislature may compel a municipal corporation to submit to arbitration claims as to which private corporations and natural persons would be entitled by the constitution to a trial by jury. Gray v. Brooklyn, 10 Abb. Pr. Rep. N. S. 186; *post*, sec. 760. See, as to jury, Dunsmore's Appeal, 52 Pa. St. 374. Holding contrary view, Plimpton v. Somerset, 83 Vt. 283, 1860. See, also, chapters on Municipal Courts, Property, and Ordinances, *post*.

upon the subject, and attempt to extract the principles upon which they rest.

It is decided that a grant by the legislature of the state to a town, of the right to establish a *ferry*, is not in the nature of a contract, hence the grant is repealable, and the corporation may constitutionally be deprived of the franchise.¹ So an act conferring upon a municipal corporation a *public trust*, and the *title to land* as ancillary to its execution, is not a contract, but may be repealed at the will of the legislature.² But suppose the legislature had granted in fee, to the corporation, a tract of land within its limits, is such a grant, or an ordinary grant of land to the corporation from others, a contract as respects the state, and protected by the constitution from legislative invasion, the same as if the grant had been made to, or the property acquired by, an individual or private corporation? The question thus stated has never arisen directly for adjudication in the Supreme Court of the United States; but, in the celebrated Dartmouth College Case, two of the judges expressed the opinion that the legislative control over public and municipal corporations was not so transcendent and absolute as to extend to an arbitrary

¹ East Hartford v. Hartford Bridge Co., 10 How. 511, 1850; S. C., 16 Conn. 149; 17 *Ib.* 79; Trustees v. Tatman, 13 Ill. 30; Police Jury v. Shreveport, 5 La. An. 661, 1850; Darlington v. Mayor, 31 N. Y. 164, 202, 203, *per Denio*, C. J.

² People v. Vanderbilt, 26 N. Y. 287, 1863. Where an act incorporating a city donated lands included therein, for the erection of certain public buildings, and the residue to be applied to education, and the charter was afterwards repealed, it was held that until the trust had been executed it was competent for the legislature to change or abolish it, and that the repeal of the charter extinguished the trusts, they being public, unexecuted, and conditional. Bass v. Fontleroy, 11 Texas, 698-708, 1854. Where an act of the legislature, instead of granting certain moneys received by the state for the purposes of internal improvements to certain counties absolutely, simply appropriated it *to be drawn* by such counties and expended by them in the improvement of roads, &c., it was held that before its expenditure by the counties the legislature had entire control over the fund, and might resume or change the purposes for which it was originally designed to be expended, or provide for the payment by an old county, which had received, but not expended, its proportion of such fund, to a new county erected out of the old county of an equitable share of the fund. Richland County v. Lawrence County, 12 Ill. 1, 1850, distinguished from Hampshire v. Franklin, 16 Mass. 76. *Post*, chap. VIII.

divestiture of its private property and the destruction of rights of a private nature. On the other hand, it is the opinion of a distinguished and able judge in New York, in a case already mentioned, that the authority of the legislature over the powers, rights, and property of municipal and public corporations, is, as respects the corporations, quite without limit.¹ The weight of opinion seems to be in favor of the doctrine, that there may be, in such corporations, rights under contracts and grants which are beyond destruction by the legislature, though not beyond legitimate legislative authority and control ;² but in the present state

¹ *Denio*, C. J., in *Darlington v. New York*, 31 N. Y. 164, 1865.

² In *Richland County v. Lawrence County*, 12 Ill. 1, 1850, while the plenary power of the legislature over the public, civil, or political rights of public corporations was asserted and declared, still it was admitted by the very able and cautious judge who delivered the opinion, that "the state may make a contract with, or a grant to, a public municipal corporation which it could not subsequently resume; but in such case the corporation is to be regarded as a private company." *Per Trumbull*, J. See *West. Sav. Fund Society v. Philadelphia*, 31 Pa. St. 175; *Ib.* 185.

"But while the legislative power (to enlarge, restrain, or even destroy municipal corporations, as the public interest may require) may be exercised over public and municipal corporations, it has as uniformly been held that towns, and other public corporations, may have private rights and interests vested in them under their charter; and as to those rights, they are to be regarded and protected the same as if they were the rights and interests of individuals or of private corporations, and grants of property in trust for other than corporate and municipal use (that is, as we understand, for private, as distinguished from public, purposes), are no more the subject of legislative control than are the private and vested rights of individuals." *Per Isham*, J., *arguendo*, in *Montpelier v. East Montpelier*, 29 Vermont (3 Wms.) 12, 19, 1856; S. C., 27 *Ib.* 704.

Legislative grants of property to private, and it seems, also, to public and municipal, corporations, cannot be repealed so as to divest the rights of the grantees. *Town of Pawlet v. Clark*, 9 Cranch (U. S.) 292, 336, 1815, *per Story*, J., *obiter*; *Terret v. Taylor*, *Ib.* 43, 52. In this last case, Mr. Justice *Story* remarks, *arguendo*: "In respect, also, to public corporations, which exist only for public purposes, such as counties, towns, cities, &c., the legislature may, under proper limitations, have a right to change, modify, enlarge or restrain them, *securing, however, the property*, for the uses of those for whom and at whose expense it was originally purchased." Followed by Chancellor Kent, 2 Com. 305; by Mr. Justice *Washington*, *Dartmouth College Case*, 4 Wheat. 518, 663. In the last case, Mr. Justice *Story* said: "But it will hardly be contended, that even in respect to such [public] corporations, the legislative power is so transcendent that it may, at its will,

of the decisions the subject cannot be fairly said to be settled.

§ 41. It is an interesting inquiry, which has not yet arisen for judgment, whether the legislature of the state has the right, in virtue of its control over municipal corporations, to annul or interfere with *contracts* between two municipalities. If a municipal corporation, however, becomes indebted, the *rights of the creditors* cannot, it is clear, be impaired by any subsequent legislative enactment.¹

take away the *private property* of the corporation, or change the uses of its private funds acquired under the public faith." 4 Wheat. 518, 694, *obiter*. And such is Mr. Justice *Coolley's* view in his valuable treatise. Constitutional Limitations, 238. He reiterates it in his learned opinion in *People v. Hurlburt*, 24 Mich 44; S. C., 6 Am. Law Rev. 876, 1871. In *Grogan v. San Francisco*, 18 Cal. 590, Mr. Chief Justice *Field*, delivering the opinion of the Supreme Court of California, takes the ground that the real estate or private property of a municipal corporation is protected by the clause in the national constitution securing the inviolability of contracts; that all legislative authority over it must be exercised in subordination to this guaranty, and that it is subject to legislative control to the same extent, but no greater extent, than all other property in the state. But in *Darlington v. Mayor, &c. of New York*, 31 N. Y. 164, 193, 205, Mr. Chief Justice *Denio* observes: "Let us suppose the city to be the owner of a parcel of land not adapted to any municipal use, but valuable only for sale to private persons for building purposes, or the like; no one, I think, can doubt but what it would be competent for the legislature to direct it to be sold, and the proceeds devoted to some municipal or other public purpose, within the city, as a court-house, a hospital, or the like. . . . It is unnecessary to say whether the legislative jurisdiction would extend to diverting the city property to other public use than such as concerns the city and its inhabitants." And he considers the expression of Chancellor Kent (2 Com. 305) and of Mr. Justice *Story*, that where a municipal corporation is empowered to have and to hold private property, such property is invested with the security of other private rights, to mean only that it possesses such rights against wrong-doers, and not that it is exempt from legislative control. 31 N. Y. 164, 196.

¹ *Van Hoffman v. Quincy*, 4 Wall. 535; *Butz v. Muscatine*, 8 *Ib.* 575; *Lee County v. Rogers*, 7 *Ib.* 175; *Furman v. Nichol*, 8 *Ib.* 44; *Woodruff v. Trapnall*, 10 How. 206; *Bronson v. Kinsie*, 1 *Ib.* 316; *Lansing v. County Treasurer*, 1 Dillon Cir. C. R. 522; *Muscatine v. Railroad Company*, *Ib.* 536; *State v. Milwaukee*, 25 Wis. 122; *Brooklyn Park Com. v. Armstrong*, 45 N. Y. 234, 1871; *Soutter v. Madison* (act forbidding city to levy taxes to pay judgments held void), 15 Wis. 30; *Western Savings Fund Society v. Philadelphia*, 31 Pa. St. 175, 185. Further, see chapter on Contracts, *post* sec. 415 *et seq.*

Thus, where an act of the legislature was passed to provide for the payment of the debts of a municipal corporation and authorizing the creation of a *sinking fund*, to be deposited and applied in a particular manner, and where creditors acting thereunder have surrendered the evidences of their debts and received new bonds, for the payment of which the fund stands pledged by the act, it is not competent—because it impairs the obligation of contracts—for a subsequent legislature, in providing for the liquidation of the corporate debts, to give a different destination to the sinking fund by changing the depository of the fund.¹ So where the effect of an act of the legislature authorizing a city to *fund its floating debt* was, in substance, a pledge to those who surrendered their claims and received new obligations, to trustees of a portion of her revenues and property, to be applied to the payment of her obligations in a specified mode, this, if acted on, constitutes a contract which cannot be materially altered, either by the municipality or the legislature, without the sanction of the creditors; but it was held that a subsequent act, simply changing the mode of levying taxes, and which did not and could not affect the result or impair the security of the creditors, was not invalid.² So, also, where the legislature authorized an indebted city to issue bonds to a specified amount, in payment of a like amount of its outstanding bonds, and, among other provisions, plainly intended to induce creditors to make the exchange, was one prohibiting the city from thereafter issuing its bonds, “except in payment of its bonded debt,” and this authority having been acted on, and the arrangement accepted by the creditors, and new bonds issued, it was decided by the Supreme Court of Wisconsin that the prohibition against the issue of further bonds constituted, in favor of the holders of the new bonds, a contract, which the legislature could not impair by a subsequent enactment, authorizing the municipality to issue additional bonds for other purposes.³

¹ *Liquidators v. Municipality*, 6 La. An. 21, 1851. As to *sinking fund*, see *Terry v. Bank*, 18 Wis. 87; *post*, chapter on Charters. *Fraudulent transfers* of property by municipal corporations, *Smith v. Morse*, 2 Cal. 524.

² *People v. Bond*, 10 Cal. 563, 1858. And see *People v. Wood*, 7 Cal. 579, 1857; *Brooklyn Park Com. v. Armstrong*, 45 N. Y. 234, 1871.

³ *Smith v. Appleton*, 19 Wis. 468, 1865. Extent of legislative power

§ 42. But authority to a city to borrow money, and to tax all the property therein to pay the debt thus incurred, does not necessarily deprive the state of the power to modify taxation so as to exempt portions of the property, if the rights of creditors be not thereby impaired.¹ So authority given in a railroad charter to a county to take stock and issue bonds therefor, if a majority of the voters so determine, is not a contract, but a mere authority conferred upon the county in its public capacity, and may be repealed at any time before the subscription has been made.²

over *municipal indebtedness* as against the municipality, see *City v. Lamson*, 9 Wall. 477, and read, in connection therewith, *Campbell v. Kenosha*, 5 Wall. 194, in effect overruling the practical application of *Foster v. Kenosha*, 12 Wis. 616, 1860; *post*, chapters on Charters and Contracts.

Where the performance of the obligation of a public or municipal corporation has been rendered impossible by act of the law, as, for example, by a subsequent statute, the obligation is discharged, and no action against the corporation will lie thereon. This principle is well exemplified in *Brown v. Mayor, &c. of London*, 9 Com. B. (N. S.) 726, 1861, respecting the liability of London on bonds payable out of tolls and duties levied on vessels navigating the Thames. In this country, however, it is to be remembered that the legislative power, as respects creditors, is restrained by the provision of the Federal Constitution that no state shall pass any act impairing the obligation of contracts.

¹ *Gilman v. Sheboygan*, 2 Black, 510, 1862; *Muscatine v. Railroad Company*, 1 Dillon C. C. 536.

As against a municipal corporation, the legislature may, it has been recently decided by the Supreme Court of Missouri, repeal its powers to levy and collect wharfage, although the proceeds of the public wharf had been pledged by the corporation, under legislative authority, as a fund in connection with other revenues for the payment of bonds issued for money borrowed by the corporation to maintain and improve the wharf. After the issue of such bonds, which were outstanding, and after the passage of a subsequent act repealing all acts which authorized the municipality to collect wharfage, it sued the defendant for refusing to pay wharfage, on the ground that the repealing act was unconstitutional; but the Supreme Court, assimilating the case to that of *Gilman v. Sheboygan*, 2 Black, 510, and distinguishing it from *Van Hoffman v. Quincy*, 4 Wall. 535, held that the city could not recover. The language of the judge delivering the opinion would seem to imply that the repealing act would not be invalid as to creditors unless other funds should prove insufficient; but it should be observed that this was not a point adjudged in the case. *St. Louis v. Shields*, Supreme Court of Missouri, March, 1873.

² *Aspinwall v. County of Jo Daviess*, 22 How. 364, 1859. If not indeed at any time before it is paid for. *People v. Coon*, 25 Cal. 635; *Unior Pacific R. R. Co. v. Davis County*, 6 Kansas, 256, 1870; *post*, sec. 696, *note*.

§ 43. The legislature, as the trustee for the general public, has full control over the *public property* and the *subordinate rights* of municipal corporations. Accordingly, it may authorize a railroad company to occupy the streets in a city without its consent and without payment, but it could not, probably, authorize the taking of the private property of a city by a railroad company, except for public purposes, and upon compensation being made.¹ It may authorize corporations to make contracts, but it is more doubtful whether it can make contracts for them, since the essence of a contract consists in the agreement of the parties. And on this view it has been held, in Vermont, that the legislature cannot, *without the consent* of a municipal corporation, appoint an agent for it, and authorize him, as such agent, to purchase property and bind the corporation to pay for it.² So the supreme court of Illinois has, very recently, decided that the legislature, under peculiar provisions in the constitution of that state, has no power to compel a city

¹ *Darlington v. Mayor, &c.*, 31 N. Y. 164, 1865; *Reynolds v. Stark County*, 5 Ohio, 204; 5 Ohio St. 113; *Clinton v. Railroad Company*, 24 Iowa, 453, 1868; *Louisville v. University of Louisville*, 15 B. Mon. 642, 1855. See, further, chapters on Streets and on Dedication, *post*; *People v. Kerr*, 27 N. Y. 188; *Mercer v. Railroad Company*, 86 Pa. St. 99; *Mayor, &c. v. Hopkins*, 13 La. An. 326; *Reading v. Commonwealth*, 11 Pa. St. 196; *post*, sec. 555.

² *Atkins v. Randolph*, 31 Vt. 226, 1858. The case was this: Plaintiff sued the town of Randolph in assumpsit for liquor sold to an "agent" appointed by the county commissioners to purchase liquors (under the act of 1852, "to prevent the traffic in intoxicating liquors"), at the expense of the town for which he was appointed. The town never gave any assent, express or implied, to this appointment; nor did it receive any benefit from the sale of the liquors, or have any knowledge that the agent was purchasing liquors on its credit. The court held the act of 1852 unconstitutional, and that the plaintiffs could not recover. The decision was put mainly upon the ground that the legislature could not authorize a binding contract to be made creating a debt against a public corporation without its consent. *Bennett, J.*, dissented, not on the ground that the corporation was bound by force of any contract, but because the act of 1852 imposed a duty upon the towns, as *municipal corporations*, to pay for the liquors, and this for *public purposes*, and to carry out a *police* regulation. Chief Justice *Denio* criticises this case, and considers it as "standing upon no principle"—*Darlington v. Mayor, &c. of New York*, 31 N. Y. 164, 205, 1865. And see *Philadelphia v. Field*, 58 Pa. St. 820, 1868.

to incur a debt against its will.¹ Questions of this kind depend, for correct solution, not only upon the constitutional provisions in the particular state, but also, we think, upon the nature of the debt which the municipality is ordered to create. If there is no special limitation in the constitution, and the debt is one to be incurred in the discharge of a public duty, which it is proper for the legislature to impose upon the municipality, it can constitute no objection to the validity of the act, that the debt or liability is to be created without its consent. Thus, in the absence of constitutional restriction, it has been decided, and the decision is doubtless correct, that it is competent for the legislature to direct a municipal corporation to build a bridge over a navigable watercourse within its limits, or the state may appoint agents of its own to build it, and empower them to create a loan to pay for the structure, payable by the corporation.²

¹ *People v. Chicago (Lincoln Park Case)*, 51 Ill. 17, 1869; *People v. Salmon (South Park Case)*, *Id.* 87; *Howard v. Drainage Company*, *Id.* 130. Though the reasoning of the court is general, yet the point decided, that the city could not be compelled to contract a debt against its consent, was influenced by, if it does not rest upon, a constitutional provision (art. IX. sec. 5), which was construed to restrict the legislature from granting the right of local or corporate taxation to any other than the corporate authorities of the municipality or district to be taxed. Compare *Darlington v. Mayor, &c. of New York*, 81 N. Y. 164. See *Dunnovan v. Green*, 57 Ill. 30; *Sinton v. Ashbury*, 41 Cal. 525, 1871.

The general propositions in the text as to the restrictions on legislative power over municipal corporations will be found to be sustained by the following cases: *Atkins v. Randolph*, 81 Vt. 226, 1858; *White v. Fuller*, 39 Vt. 193; *Louisville v. The University*, 15 B. Mon. 642; *Western Savings Fund Society v. Philadelphia*, 81 Pa. St. 175, 185; *Montpelier v. East Montpelier*, 29 Vt. 12; *Poultney v. Wells*, 1 Aik. (Vt.) 180; *Trustees v. Winston*, 5 Stew. & Port. (Ala.) 17; *Norris v. Trustees Abingdon Academy*, 7 Gill & Johns. (Md.) 7; *Regents of University v. Williams*, 9 *Id.* 365; *Trustees of Academy v. Aberdeen*, 13 Sm. & Mar. (Miss.) 645; *Brunswick v. Litchfield*, 2 Maine (2 Greenl.), 28, 32.

² *Philadelphia v. Field*, 58 Pa. St. 820, 1868, approving *Thomas v. Leland*, 24 Wend. 65; *supra*, sec. 30, note, and cases cited. *United States v. B. & O. R. R. Co.*, U. S. Sup. Court, December term, 1872; *post*, sec. 615*a*; *Carter v. Bridge Proprietors*, 104 Mass. 236, 1870. But the legislature would not, of course, possess such extensive powers over a private corporation. *Erie v. Canal*, 59 Pa. St. 174.

§ 44. The fact that a claim against a municipal or public corporation is not such an one as the law recognizes as of *legal obligation*, has been decided to form no constitutional objection to the validity of a law imposing a tax and directing its payment;¹ but the validity of legislation of this

¹ *Guilford v. Supervisors, &c.*, 18 N. Y. (3 Kern.) 143, 1855. This case holds the following propositions: 1. That the legislature has power to levy a tax upon the taxable property of a town, and appropriate the same to the payment of a claim made by an individual against the town. 2. That it is not a valid objection to the exercise of such power that the claim, to satisfy which the tax is levied, is not recoverable by action against the town. 3. That it does not alter the case that the claim has been rejected by the voters of the town, when submitted to them at a town meeting, under an act of the legislature authorizing such submission, and declaring that their decision should be final and conclusive.

This case has recently been approved, *arguendo*, by the Supreme Court of the United States. *The United States v. Baltimore & Ohio Railroad Co.*, December term, 1872.

On the contrary, the same case has been lately disapproved by the Supreme Court of Wisconsin, in the *State v. Tappan*, 29 Wis. 664, 1872, and an act of the legislature of Wisconsin, similar in its nature and principles to that involved in *Guilford v. Supervisors*, *supra*, was held unconstitutional. The opinion of *Lyon, J.*, evinces great care in its preparation, but it has failed to satisfy us, that, in the absence of special constitutional restraints, the extent of the legislative power of taxation depends upon the *consent* of the municipality or the people therein, or that the special act before the court exceeded the rightful power of the legislature. The principle has been recently reaffirmed, in Massachusetts, that the discretionary power of the legislature in the distribution of public burdens embraces the power to authorize an assessment on one district for part of the expense of repairing a portion of a bridge in another. *Carter v. Bridge Proprietors*, 104 Mass. 236, 1870; *post*, sec. 588. See Mr. Sedgwick's opinion of this legislation, Const. and St. Law, 313, 314. The principle of *Guilford v. Supervisors* was applied in *Brewster v. Syracuse*, 19 N. Y. 116, 1859, where it was decided by all of the judges of the court of appeals that the legislature has the power to authorize the levy of a tax for the purpose of paying to one who has constructed a municipal improvement (a street sewer) an addition to the contract price, which the corporation was forbidden to pay by its charter. The court did not consider that there was any contract in the case, and sustained the legislation on the ground that it was warranted by the taxing power, which, in that state, was not restrained, thus leaving it in the discretion of the legislature to recognize and direct the payment of claims founded in equity and justice, or in gratitude or charity. *People v. Mayor, &c. of Brooklyn*, 4 Comst. 419. And see *Thomas v. Leland*, 24 Wend. 65, 1840; *Shelby Co. v. Railroad Co.*, 5 Bush (Ky.) 225; *Philadelphia v. Field*, 58 Pa. St. 320, 1868. This seems to be carrying the doctrine of the control of the legislature over public corpora-

character, if it interferes with what has been called the *private* contracts of such corporations, must be sustained on the ground that such contracts, so far as the corporations are concerned, are under the absolute control of the legislature, and not within the protection of the national constitution. The cases on this subject, when carefully examined, go no further, probably, than to assert the doctrine that it is competent for the legislature to compel municipal corporations to recognize and pay debts not binding in law, and which, for technical reasons, could not be enforced in equity, but which, nevertheless, are just and equitable in their character, and involve a moral obligation.¹ To this extent and with this limitation, the doctrine seems unobjectionable in principle, although it asserts a measure of control over municipalities, in respect of their duties and liabilities, which does not exist as to private corporations and individuals.

§ 45. Accordingly, it has been decided recently, in Maryland, that, as against the *abutters*, the legislature could not ratify an assessment for a local improvement in front of their property, and which had been adjudged to be

tions to its extreme limit. See Mr. Justice *Cooley's* views, Const. Lim. 880, 491, notes. The Supreme Court of California has followed and approved *Guilford v. Supervisors*. *Blanding v. Burr*, 13 Cal. 343, 1859. *North Mo. R. R. Co. v. Maguire*, 49 Mo. 490, 500, 1872. Under special provisions of Michigan constitution, see *People v. Onandaga*, 16 Mich. 254. Where one county is under a moral obligation to reimburse another county for certain expenses, the legislature may give this a legal effect by a subsequent act. *Lycoming v. Union*, 15 Pa. St. 166, 1850. Rights of trial by jury may be denied by the legislature to municipal corporations, these being mere creatures of its policy, with such rights only as it sees proper to confer. *Borough of Dunsmore's Appeal*, 52 Pa. St. 374; but see, *supra*, sec. 39, note.

¹ *Blanding v. Burr*, 13 Cal. 343, 1858; *Lycoming v. Union*, 15 Pa. St. 166; *Guilford v. Supervisors*, 13 N. Y. 144, 1855; *Brewster v. Syracuse*, 19 N. Y. 116, 1859; *Thomas v. Leland*, 24 Wend. 65, 1840; *Hasbrouck v. Milwaukee*, 21 Wis. 217, 1866; *Smith v. Morse*, 2 Cal. 524; *Grogan v. San Francisco*, 18 Cal. 590; *Sinton v. Ashbury*, 41 Cal. 525, 1871.

The legislature, in favor of a county collecting officer, who has settled and paid a claim against him, may pass an act authorizing the settlement to be opened and *equitably* adjusted, and such an act is an implied direction that the rule of law, as to voluntary payments, shall not apply. *Burns v. Clarion Co.*, 62 Pa. St. 422, 1869.

void, and compel them to pay for the same.' In the case just mentioned, the legislature, in an act relating to the grading and paving of an avenue in the city of Baltimore, among other things, required, as preliminary to proceedings thereunder, that the mayor and council of the city should determine the proposed work to be consistent with the public good. An application, by property owners, for the improvement, was made to the city commissioners instead of the mayor and council, and the commissioners determined to grade the avenue, awarded the contract, and the contractor did the work at the cost of over \$100,000. The abutters instituted no proceeding to stop the work, and after it was completed the city passed an ordinance ratifying the contract to grade, and all the acts of the officers of the city in relation to the grading of the avenue. An assessment being made upon their property, to pay the expense of the grading, they filed a bill for an injunction and relief, and it was judicially determined that the proceedings of the city commissioners were *coram non judice* and void, and that they could not be ratified by ordinance.' After this judicial determination, the legislature passed an act directing the city to pay the contractors for the work done by them and accepted by the city, to borrow the money for the purpose, and levy a tax for its payment, which the city did. But at the same session, the legislature, to reimburse the city treasury, empowered the city to collect from the abutters on the avenue graded the amounts which had been assessed and ascertained by the city commissioners, and this last act was held by the Court of Appeals to be void, because it was an assumption of judicial power by the legislature, and, in effect, a legislative reversal of the former judgment of the court.

§ 46. In general, however, the legislature may, by subsequent act, validate and confirm previous acts of the corporation otherwise invalid.' Merely because such legislation, in matters not relating to crimes, is retrospective,

¹ Baltimore v. Horn, 26 Md. 194, 1866.

² Baltimore v. Porter, 18 Md. 284, 1861. See *infra*, sec. 652.

³ Bridgeport v. Railroad Co., 15 Conn. 475, 1843, in which it was held, that the legislature might validate prior subscription of city to stock of

does not make it void. If in addition to its being retrospective, it unjustly impairs or abrogates vested rights, and, without reasonable cause, imposes upon third persons new duties in respect to past transactions, it will be void because in conflict with the constitution.¹

§ 47. While it is undeniable that the legislature has full control over public corporations, and over the funds which belong to them as such, and held for strictly corporate purposes; yet where, by authority of law, such corporations hold property or funds *in trust for specific uses*, it is left in doubt by the cases how far the legislature can, unless the uses be strictly public or charitable, interfere with or control such trust property or funds. In a very recent case of great interest, the Supreme Court of Pennsylvania decided, that it was within the power of the legislature to deprive the city of Philadelphia of the right to administer charitable trusts under the will of Mr. Girard and others, which had been granted to and accepted by it, and to confer the administration of these trusts upon a separate body, called "Directors of City Trusts," appointed by

railroad company. *S. P. Winn v. Macon*, 21 Geo. 275, 1857; *McMillen v. Boyles*, 6 Iowa, 304; *Id.* 391; *New Orleans v. Poutz*, 14 La. An. 853; *Bissell v. Jeffersonville*, 24 How. 287, 295, 1860; *Achison v. Butcher*, 8 Kansas, 104, 1865; *Frederick v. Augusta*, 5 Geo. 561; *Truchelut v. City Council*, 1 Nott & McCord (South Car.) 227; *Cooley Const. Lim.* 371, 379. *Post*, secs. 352, 424, 652.

¹ *Bridgeport v. R. R. Co.*, 15 Conn. 475, 497, and cases cited *per Church, J.* Laws passed to remedy defective execution of powers of public corporations, or their officers, are valid, though retrospective in their operation, unless they contravene some provision of the state constitution. *State v. Newark*, 3 Dutch. (N. J.) 187, 1858; *Bissell v. Jeffersonville*, 24 How. 287, 295, where such curative acts are said to be valid when contracts are not impaired, or the rights of third persons injuriously affected.

It is competent for the legislature to *validate a city ordinance* which had become null and void for want of being recorded, and to provide that the omission to record shall not impair the lien of the assessments against the lot owners. *Schenley v. Commonwealth*, 36 Pa. St. 29, 1859. The legislature may ratify, and thereby make binding an *unauthorized municipal subscription* to the stock of an incorporated theatre company. *Municipality v. Theatre Co.*, 2 Rob. (La.) 209, 1842; but, *quere*, whether, if the legislature had the power, the act in this case was properly held to be a ratification. See, further, chapter on Contracts, *post*, sec. 424.

the judges of the Supreme Court and other judges named in the act. It is to be remarked, however, that the legislature did not attempt to change or pervert the trusts themselves.¹ Certain it is, that without legislative authority, a municipal corporation holding the legal title to property in trust, cannot use the funds derived from such property for corporate purposes, or, indeed, for any except the trust purposes.²

¹ Philadelphia v. Fox, 64 Pa. St. 169, 1870. *Post*, sec. 437 *et seq.*

² White v. Fuller, 39 Vt. 193; *ante*, sec. 37; Montpelier v. East Montpelier (contest as to trust property on division of town), 27 Vt. (1 Wms.) 704, 1854; same controversy in chancery, 29 Vt. (3 Wms.) 12. See, also, Trustees, &c. v. Bradbury, 2 Fairf. (Me.) 118; Poultney v. Wells, 1 Aik. (Vt.) 180; Plymouth v. Jackson, 15 Pa. 44; Harrison v. Bridgeton, 16 Mass. 16; Daniel v. Memphis, 11 Humph. (Tenn.) 582; Trustees of Academy v. Aberdeen, 13 Sm. & Mar. (Miss.) 645, as to which, *quere*. Aberdeen v. Sanderson, 8 Ib. 670; Chambers v. St. Louis, 29 Mo. 543; Holland v. San Francisco, 7 Cal. 361; Girard v. Philadelphia, 7 Wall. 1. See, *post*, chapters on Corporate Property and Remedies Against Illegal Corporate Acts.

A conveyance was made in 1873, by the proprietors of the lands, to the selectmen of North Yarmouth, of "all the flats, sedge banks, and muscle beds in said town, lying below high water mark," "for the sole use and benefit of the present inhabitants, and of all such as may or shall forever inhabit or dwell in said town," &c. It was decided that this property was held by the town as a *public* corporation, subject to legislative control, *in trust* for the use of all of the inhabitants, and that upon a division of the town, it was competent for the legislature to provide that the original town should still hold such property in trust for the inhabitants of both towns. North Yarmouth v. Skillings, 45 Maine, 133, 1858. *Post*, sec. 127.

To another town in Maine, lands were granted by Massachusetts prior to the separation of Maine therefrom, for the *use of its schools*. The legislature, in 1803, on the application of the town, authorized the sale of the lands, and gave to certain designated *trustees* the right to control the funds raised by the sale of the lands. This was considered as constituting a *contract*, and it was accordingly held that a subsequent act of the legislature, authorizing the town to choose a new set of trustees, and directing the first trustees to deliver over the trust property, was agreeably to the principles settled in the Dartmouth College Case, unconstitutional and void. The Trustees, &c. v. Bradbury, 11 Maine, 118, 1834; Yarmouth v. North Yarmouth, 34 Maine, 411, 1852. In this last case the trustees of the funds were a *private* corporation, and not subject to legislative control. In North Yarmouth v. Skillings, 45 Maine, 133, 1858, the trustees of the property or fund in question were a *public* corporation, and subject to such control. The rule as to private and public corporations is well exemplified in these two cases. See, also, Norris v. Abington Academy, 7 Gill & Johns. (Md.) 7;

Bass v. Fontleroy, 11 Texas, 698; Louisville v. University of Louisville, 15 B. Mon. 642.

In the State v. Springfield Township, 6 Ind. (Porter) 83, 1854, it was held, that a law of the state (act of 1852), so far as it diverted the proceeds of the sale of the sixteenth section (granted by act of Congress of April 19, 1816) from the use of schools in the *congressional* township where the land was situated, to the use of the school system of the state at large, was in contravention of that section of the state constitution (sec. 7, art. VIII.) which provides, that "All trust funds, held by the state, shall remain inviolate, and be faithfully and exclusively applied to the purpose for which the trust was created."

CHAPTER V.

MUNICIPAL CHARTERS.

General Municipal Powers.—Their Nature and Construction.

§ 48. This chapter will treat of Municipal Charters, and the principles upon which they are construed, and of the general nature of the powers which they confer upon the corporation or upon its legislative or governing body. The subject will be considered under the following heads: 1. Charters Defined. 2. Judicially Noticed. 3. Proof of Corporate Existence. 4. Repeal and Amendment of Charters. 5. Conflict between General Laws and Special Charters. 6. Extent of Corporate Powers, Limitations Thereon, and Canons of Construction. 7. Usage as affecting Powers and Their Interpretation. 8. Discretionary Powers. 9. Public Powers Incapable of Delegation. 10. Or Surrender. 11. Mandatory and Discretionary Powers. 12. Exemption of Revenues from Judicial Seizure, and herein of Garnishment.

Charters Defined.

§ 49. We have before seen that, in this country, municipal corporations are created by legislative act, either in the form of a legislative charter or by general incorporating statutes.¹ A municipal charter, granted by the crown in England is a written instrument, made in the form of letters patent, with the great seal appended to it, addressed to all the subjects, and constituting the persons therein named, and their successors, a body corporate for or within the place therein specified, and prescribing the powers and duties of the corporation thereby created. But such charters are inoperative until accepted.² Here, as we have else-

¹ *Ante*, secs. 19, 20.

² *Ante*, secs. 15, 23. Outline of charter of the middle ages, *ante*, sec. 6.

where shown, the legislature creates, alters, and, in the absence of constitutional restriction, can destroy, municipal and public corporations at its will, and it invests them with such powers, and requires of them such duties, as it deems most expedient for the general good, and for the benefit of the particular locality.¹ No precise form of words is necessary to create a corporation, and a corporation may be created by implication.²

Charters Judicially Noticed.

§ 50. Courts will judicially notice the charter or incorporating act of a municipal corporation without being specially pleaded, not only when it is declared to be a *public statute*, but when it is *public or general in its nature or purposes*, though there be no express provision to that effect. But the acts, votes, and ordinances of the corporation are not public matters, and must be pleaded.³

Proof of Corporate Existence.—User.—Legislative Recognition.

§ 51. The primary evidence of a special charter or act of incorporation, in this country, is the original, or an authenticated copy, or printed copy, published by authority. But if primary evidence cannot be had, parol or secondary evidence of its existence is admissible.⁴ Thus, where a public corporation had existed for a long space of time (in the instance

¹ *Ante*, secs. 8, 9, 10.

² *Ante*, secs. 21, 22.

³ *Beatty v. Knowles*, 4 Pet. (U. S.) 152, 157, 1830; *Aldermen v. Finley*, 5 Eng. (Ark.) 423, 1850; *Fauntleroy v. Hannibal*, 1 Dillon C. C. 118, 1871; *Prell v. McDonald*, 7 Kansas, 426, 1871; *West v. Blake*, 4 Blackf. (Ind.) 234, 1836; *Briggs v. Whipple*, 7 Vt. 15, 18, 1835; *Case v. Mobile*, 30 Ala. 538, 1857; *Clarke v. Bank*, 5 Eng. (Ark.) 516; *State v. Mayor*, 11 Humph. (Tenn.) 217, 1850; see *Vance v. Bank*, 1 Blackf. (Ind.) 80, and note (2); 6 Bac. Abr. 374, note; *Young v. Bank, &c.*, 4 Cranch, 384; *Swails v. State*, 4 Ind. 516, 1853; *Portsmouth, &c. Co. v. Watson*, 10 Mass. 91; *Clapp v. Hartford*, 35 Conn. 66; *People v. Potter*, 35 Cal. 110; see, *post*, chapter on Ordinances, sec. 355. Where a public law creates the mayor and aldermen an incorporated body, no averment or proof is necessary to establish the existence of the corporation. *State v. Mayor*, 11 Humph. (Tenn.) 217, 1850.

⁴ *Stockbridge v. West Stockbridge*, 12 Mass. 400, 1815; *Braintree v. Battles*, 6 Vt. 395, 1834; *Blackstone v. White*, 41 Pa. St. 380.

before the court for forty years), the court admitted proof of its incorporation *by reputation*, the original act not being found, and it being probable that it had been destroyed by fire.¹ So evidence that a town has for many years exercised corporate privileges, no charter, after search, being found, is competent to go to the jury to establish that it was duly incorporated. And where there is no direct or record evidence that a place has been incorporated, and it is sought to show the fact of incorporation from circumstantial evidence, the question is for the jury, and not the court; that is, the jury, under the circumstances, determine whether there is or is not sufficient ground to presume a charter or act of incorporation,² or the due establishment and existence of a corporate district under some general act.³ So corporate

¹ *Dillingham v. Snow*, 5 Mass. 547, 1809. *S. P. Bassett v. Porter*, 4 Cush. 487, 1849. In view of the defective manner in which the records of *quasi* corporations—such as school and road districts, and the like—are kept, the courts, in the absence of any statute requiring record evidence, will permit the existence and organization of the corporation to be proved by *reputation and acts*, where these facts do not appear of record. *Barnes v. Barnes*, 6 Vt. 388, 1834; *Londonderry v. Andover*, 28 *Ib.* 416, 1856; *Sherwin v. Bugbee*, 16 *Ib.* 439; *Ryder v. Railroad Company*, 13 Ill. 523; *Highland Turnpike v. McKean*, 10 Johns. 154; *Owings v. Speed*, 5 Wheat. 420. See chapter on Corporate Records and Documents, *post*.

Irregularities in the proceedings to organize a corporation are not favored when set up, long afterwards, to defeat the corporate existence. *Jameson v. People*, 16 Ill. 257, 1855; *Dunning v. Railroad Company*, 2 Ind. 437, 1850; *Fitch v. Pinckard*, 4 Scam. (Ill.) 76.

Where a corporation is created, and declared to exist as such, by the legislature, without condition, proof of *organization or user* is not necessary to enable them to maintain an action. *Cahill v. Insurance Company*, 2 Doug. (Mich.) 124; *Fire Department v. Kip*, 10 Wend. 266, 1833. And see *Proprietors, &c. v. Horton*, 6 Hill (N. Y.) 501; *People v. President*, 3 Wend. 351; *Wood v. Bank*, 9 Cowen, 194, 205. When construed to be *immediately* created, the omission to do certain acts prescribed to organize the institution, was held immaterial as respects persons contracting with the corporation. *Brouwer v. Appleby*, 1 Sandf. 153, 1847. *S. P. People v. President*, 9 Wend. 351. See, also, *ante*, sec. 23.

² *New Boston v. Dumbarton*, 15 N. H. 201, 1844; *Mayor of Kingston v. Horner*, Cowp. 102, *per* Lord Mansfield.

³ *Bassett v. Porter*, 4 Cush. 487, 1849; *New Boston v. Dumbarton*, 12 N. H. 409, 412, 1841. *S. C.*, 15 N. H. 201; *Robie v. Sedgwick*, 35 Barb. 819, 1861. The exercise of corporate powers by a place for twenty years, without objection, and with the knowledge and assent of the legislature,

existence may be inferred and judicially noticed, although the incorporating act or charter cannot be found, if the fact of incorporation is clearly recognized by subsequent legislation, not in contravention of any constitutional provision respecting the mode of creating corporations.¹

Repeals and Amendments, and their Effect.

§ 52. The powers conferred upon municipal corporations may at any time be altered or repealed by the legislature, either by a *general law* operating upon the whole state, or, in absence of constitutional restriction, by a *special act*.² A charter may be amended, and the name of the place and the governing body may be changed, and its boundaries altered, while in law the corporation remains the same.

furnishes conclusive evidence of a charter, which has been lost; or, in other words, of a corporation by prescription, which supposes a grant. *Bow v. Allentown*, 34 N. H. 351, 1857. In this case it was also held that an act of incorporation subsequently passed does not raise any *conclusive* presumption that the town was not before incorporated. *Long use and acquiescence* are evidence in support of the legal existence of a municipal corporation. *People v. Farnham*, 35 Ill. 562; *Jameson v. People*, 16 Ill. 257, 1855; *People v. Maynard*, 15 Mich. 463, 1867. Long acquiescence in the proceedings of a school district is presumptive evidence of the regular organization of such district. *Sherwin v. Bugbee*, 16 Vt. 439, 1844; *Londonderry v. Andover*, 28 *Ib.* 416. "It is now well settled in this state, that the mere fact of a school district maintaining its existence and operation for a great number of years—say fifteen—is sufficient evidence of its regular organization. The same rule of presumption must be applied to the subdivision of the town into districts." *Per Reelfield, J.*, in *Sherwin v. Bugbee*, *supra*.

¹ *Jameson v. People*, 16 Ill. 257, 1855; *Swain v. Comstock*, 18 Wis. 463, 1864; *People v. Farnham*, 35 Ill. 562; *Bow v. Allentown*, 34 N. H. 351, 1857; *Society, &c. v. Pawlet*, 4 Pet. 480, 1830; *Railroad Company v. Chenoa*, 48 Ill. 209; *Virginia City v. Mining Company*, 2 Nev. 86, 1866; *Railroad Company v. Plumas County*, 37 Cal. 354. *An'e*, sec. 21.

² *Per Smith, J.*, *Sloan v. State*, 8 Blackf. (Ind.) 361, 1847, approving *People v. Morris*, 13 Wend. 325; *Daniel v. Mayor, &c.*, 11 Humph. (Tenn.) 582; *State v. Mayor*, 24 Ala. 701, 1854; *Girard v. Philadelphia*, 7 Wall. 1, 1868. *Ante*, sec. 24; sec. 29 *et seq.* The provisions of an amendatory act, reducing the number of councilmen, though the act took effect at once, were postponed until the next year, when they could be called into requisition at the election—no earlier election being provided for—and meanwhile the existing council remained unaffected by the amendment. *Scovill v. Cleveland*, 1 Ohio St. 126, 1853. Same principle applied. *Reading v. Keppleman*, 61 Pa. St. 233, 1869.

The insertion in an amended charter of the same provisions that were contained in the old is not, unless such upon the whole act appears to have been the intention of the legislature, a repeal of the latter. The law on this subject is thus stated: "Where a statute does not, in express terms, annul a right or power given to a corporation by a former act, but only confers the same rights and powers under a new name, and with additional powers, such subsequent act does not annul the rights and powers given under the former act and under its former name," there being no express repeal.¹

§ 53. *A repeating clause* in a revised and amendatory charter, when a former provision is included in the revised act, does not, as to such provision, interrupt the continuity of the original act.² Where the original charter of a city prescribed the qualifications required to make a person eligible to the office of mayor, and contained a proviso that a certain fact disqualified, and an amendatory act, in dealing in the same subject, copied all of the original act

¹ *State, &c. v. Mobile*, 24 Ala. 701, 1854; *Girard v. Philadelphia*, 7 Wall. 1, 1868; *Commonwealth v. Worcester*, 8 Pick. (Mass.) 474, 1826; *Grant on Corp.* 24, and cases cited; *Ib.* 305. See chapter on Dissolution, *post*. "There is no doctrine better settled," says Mr. Justice *Strong*, "than that a change in the form of government of a community does not *ipso facto* abrogate pre-existing law, either written or unwritten. This is true in regard to what is strictly municipal law, even when the change is by conquest. The act of assembly converting a borough into a city did not, therefore, of itself, and in the absence of express provisions to that effect, either repeal the former acts of assembly relative to the borough, or annul existing ordinances. It was solely a change in the organic law for the future, and left unaffected the existing ordinances, precisely as a change of a state constitution leaves undisturbed all prior acts of assembly." *Trustees of Academy v. Erie*, 31 Pa. St. 515, 517, 1858. As to transfer to new or reorganized corporation of the property and rights of the old or former corporation, see *Girard v. Philadelphia*, 7 Wall. 1, 1868; *Savannah v. Steamboat Company*, R. M. Charl. (Geo.) 342; *Fowler v. Alexandria*, 3 Pet. 398, 408; *Municipality v. Commissioners*, 1 Rob. (La.) 279. Transition from town to city organization does not dissolve the corporation or extinguish its indebtedness. *Olney v. Harvey*, 50 Ill. 453, 1869; *Maysville v. Shultz*, 3 Dana, 10, 1865; *Frank v. San Francisco*, 21 Cal. 668; *post*, Chapter VII.

² *St. Louis v. Alexander*, 23 Mo. 483, 1856.

except the proviso, *which was omitted*, the court held that the proviso in the original act was not repealed, placing stress, however, upon the express declaration that all parts of the new act inconsistent with, or contrary to, the old one, were repealed. There is, however, much room to contend that the subject matter having been revised in the amandatory act *in the manner it was*, the legislative intention was to repeal, and not to continue in force, the proviso.¹ A general law, forbidding the opening of streets through cemeteries, is not repealed by a subsequent act extending the limits of a town and appointing commissioners with authority "to survey, lay out, &c., streets and alleys, as they shall deem necessary within said limits," since both acts can stand, and repeals by implication are not favored.² So a general statute expressly prohibiting a municipal corporation from debarring citizens from selling at wholesale in the city market is not repealed, by implication, by a subsequent act, by which the city authorities are invested with power to pass such ordinances as appear to them necessary for the security, welfare, &c., of the city.³ So, also, where a state law required auctioneers to take out a state license, and a subsequent charter to a city gave it power "to provide for licensing, taxing, and regulating auctions," &c., it was held that a license granted by the city corporation to an auctioneer did not relieve him of the necessity of obtaining, also, a license from the state authorities, the court being of opinion that both statutes should and ought to stand, as they were not inconsistent.⁴

General Laws and Special Charters.—Conflict.—Construction.

§ 54. It is a principle of very extensive operation, that statutes of a general nature do not repeal, by implication, charters and special acts passed for the benefit of particular

¹ State v. Merry, 3 Mo. 278, 1833. Consult Goodenow v. Buttrick, 7 Mass. 140, 143; King v. Grant, 1 Barn. & Adol. 104.

² Egypt Street, 2 Grant (Pa.) Cas. 455, 1854. See, further, *infra*, sec. 54, as to repeals by implication.

³ Haywood v. Savannah, 12 Geo. 404, 1853.

⁴ Simpson v. Savage, 1 Mo. 359, 1823.

municipalities;¹ but they do so when this appears to have been the purpose of the legislature. If both the general and special acts can stand, they will be construed accordingly. If one *must* give way it will depend upon the supposed intention of the law-maker, to be collected from the entire course of legislation, whether the charter is superseded by the general statute, or whether the special charter provisions apply to the municipality, in exclusion of the general enactments. So particular provisions of charters should be read and construed in the light of the whole instrument, of all preceding charters, of the general legislation of the state, and of the object of the legislature in the erection of municipalities, as before explained.²

¹ Bond v. Hiestand, 20 La. An. 189; Railroad Company v. Alexandria, 18 Gratt. (Va.) 176, 1867; Hammond v. Haines, 25 Md. 541; Louisville v. McKean, 18 B. Mon. 9; Cumberland v. Magruder, 34 Md. 381, 1871; *post*, secs. 89, 107. *Repeals by implication* are not favored; and special laws conferring particular rights upon municipal corporations were held not to be repealed by subsequent statutes, general in their character. Ottawa v. County, 12 Ill. 339; Egypt Street, 2 Grant (Pa.) Cas. 455, 1854; *supra*, sec. 53. A general statute, repealing all acts contrary to its provisions, held not to repeal a clause in the charter of a municipal corporation upon the same subject. State v. Branin (taxation), 8 Zab. (N. J.) 484, 1852.

The principle that *general legislation* on a particular subject must, in the absence of anything showing a different intent on the part of the legislature, give way to *inconsistent special legislation* on the same subject, is recognized and applied in the following cases: State v. Morristown, 33 N. J. Law, 57, 1868; State v. Branin, 3 Zab. 484; State v. Clark, 1 Dutch. 54; State v. Jersey City, 5 *Ib.* 170; Jersey City v. Railroad Co., 20 N. J. Eq. 360; *in re* Goddard, 16 Pick. 504; Railroad Company v. Alexandria, *supra*. In Bank v. Bridges, 1 Vroom (N. J.) 112, and State v. Miller, *Ib.* 368, special laws gave way to general laws, because the legislature had annexed to the latter a repealing clause, abrogating all inconsistent local or special acts. *Per Depue, J.*, 33 N. J. 57, 60. See Bank v. Davis, 1 McCarter Ch. (N. J.) 286; Clintonville v. Keeting, 4 Denio, 341; Tierney v. Dodge, 10 Minn. 166. Other illustrations will be found in the chapters on Ordinances and Taxation, *post*, sec. 614.

² Alexandria v. Alexandria (taxing power), 5 Cranch, 2. 1809; Grant on Corp. 27; Canal Company v. Railroad Company, 4 Gill & Johns. 1; Smith v. Kernochen, 7 How. 198; Janesville v. Markoe, 18 Wis. 350; *ante*, secs. 9, 10, 12. Acts *in pari materia* should be construed together; and on this principle, the definition of the word "owner," in a subsequent paving act, was considered as proper to be adverted to, and as applicable to the same word in *prior* acts on the same subject. Holland v. Baltimore, 11 Md. 186. 1857.

Extent of Power—Limitation—Canons of Construction.

§ 55. It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in *express words*; second, those *necessarily or fairly implied* in, or *incident* to the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation, nor its officers, can do any act, or make any contract, or incur any liability, not authorized thereby. All acts beyond the scope of the powers granted are void. Much less can any power be exercised, or any act done, which is forbidden by charter or statute. These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations. Their reasonableness, their necessity, and their salutary character have been often vindicated, but never more forcibly than by the late learned Chief Justice *Shaw*, who, speaking of municipal and public corporations, says: “They can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association. This principle is derived from the nature of corporations, the mode in which they are organized, and in which their affairs must be conducted. In aggregate corporations, as a general rule, the act and will of a majority is deemed in law the act and will of the whole—as the act of the corporate body. The consequence is, that a minority must be bound not only without, but against, their consent. Such an obligation may extend to every onerous duty, to pay money to an unlimited amount, to perform services, to surrender lands, and the like. It is obvious, therefore, that if this liability were to extend to unlimited and indefinite objects, the citizen, by

being a member of a corporation, might be deprived of his most valuable personal rights and liberties. The security against this danger is in a steady adherence to the principle stated, viz : that corporations can only exercise their powers over their respective members, for the accomplishment of limited and defined objects. And if this principle is important, as a general rule of social right and municipal law, it is of the highest importance in these states, where corporations have been extended and multiplied so as to embrace almost every object of human concern.”¹

¹ *Per Shaw*, C. J., in *Spaulding v. Lowell*, 23 Pick. 71, 74, 1839; *Bangs v. Snow*, 1 Mass. 181; *Stetson v. Kempton*, 13 Mass. 272; *Willard v. Newburyport*, 12 Pick. 227; *Keyes v. Westford*, 17 Pick. 273, 279; *Comw. v. Turner*, 1 Cush. 493, 495, 1848; *Cooley v. Granville*, 10 Cush. 57, 1852; *Merriam v. Moody*, 25 Iowa, 163, 1868; *Minturn v. Larue*, 23 How. 435; *Lafayette v. Cox*, 5 Ind. (Port.) 38, 1854; *Paine v. Spratley*, 5 Kansas, 525; *Vincent v. Nantucket*, 12 Cush. 103, 105; *Clark v. Davenport*, 14 Iowa, 494; *Mays v. Cincinnati*, 1 Ohio St. 268; *Gallia Co. v. Holcomb*, 7 Ohio, part I. 232; *Commrs. v. Mighels*, 7 Ohio St. 109; *Fitch v. Pinckard* (taxing power), 4 Scam. (Ill.) 78; *Caldwell v. Alton* (market ordinance), 33 Ill. 416; *Trustees, &c. v. McConnel*, 12 Ill. 140; *Louisiana State Bank v. New Orleans Nav. Co.*, 3 La. An. 294; *State v. Mayor, &c.* (market house case), 5 Port. (Ala.) 279; *Head v. Ins. Co.*, 2 Cranch, 168; *De Russey v. Davis* (sale of ferry lease), 13 La. An. 468; *People v. Bank, &c.*, 1 Doug. (Mich.) 282; *City Council v. Plank Road Co.*, 31 Ala. 76; *State v. Mayor*, 5 Port. (Ala.) 279; *Ex parte Burnett*, 30 Ala. 461, and cases cited; *Le Couteleux v. Buffalo*, 33 N. Y. 338; *People v. Railroad Co.*, 12 Mich. 387.

“The powers of all corporations are limited by the grants in their charters, and cannot extend beyond them.” *Per Breece*, J., *Petersburg v. Metzger*, 21 Ill. 205. “Corporations have only such rights and powers as are expressly granted to them, or as are necessary to carry into effect the rights and powers so granted.” *Per Storrs*, J., in *New London v. Brainard* (illegal appropriation of money to celebrate 4th of July), 22 Conn. 552, 1853, approving *Stetson v. Kempton*, 13 Mass. 272; *Hodge v. Buffalo*, 2 Denio, 110, *ante*, p. 104, sec. 12. “In this country, all corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given, or may not be reasonably inferred. But if we were to say that they can do nothing for which a warrant could not be found in the language of their charters, we should deny them, in some cases, the power of self-preservation, as well as many of the means necessary to effect the essential objects of their incorporation. And therefore, it has long been an established principle in the law of corporations, that they may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly granted. In doing this, they must [unless restricted in this respect,] have a choice of means adapted to ends, and are not to be confined to any one

These general principles of law are indisputably settled, but difficulty is often experienced in their application, on

mode of operation." *Per Church, J.*, in *Bridgeport v. Railroad Co.*, 15 Conn. 475, 501, 1843. The *incidental powers* of a municipal corporation must be germane to the purposes for which the corporation was created. *Mayor v. Yuille*, 3 Ala. 137 (license to bakers); *Harris v. Intendant*, 28 *Ib.* 577 (retailing liquors); *Intendant v. Chandler*, 6 *Ib.* 899 (retailing liquors).

Courts adopt a strict, rather than liberal, construction of powers: "It is a well settled rule of construction of grants by the legislature to corporations, whether *public* or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be *resolved in favor of the public*. This principle has been so often applied in the construction of corporate powers, that we need not stop to refer to authorities." *Per Nelson, J.*, in *Minturn v. Larue*, 23 How. (U. S.) 435, 436, 1859, construing municipal charter as to ferry rights of corporation thereunder. In subsequent cases, the Supreme Court has said that a municipal corporation "can exercise no power which is not, in *express terms*, or by *fair* implication, conferred upon it." *Thompson v. Lee Co.*, 3 Wall. 320; *Thomas v. Richmond*, United States Supreme Court, December Term, 1871, 12 Wall. 349. *S. P. Clark v. Davenport*, 14 Iowa, 495; *Merriam v. Moody's Executors*, 25 Iowa, 163; *Nichol v. Mayor, &c.*, 9 Humph. 252; *Leonard v. Canton*, 85 Miss. 189, where *Fisher, J.*, gives a clear exposition of the *rationale* of the doctrine that corporate grants should be strictly construed. *Douglas v. Placerville*, 18 Cal. 643, 647; *Argenti v. San Francisco*, 16 Cal. 282; *Wallace v. San Jose*, 29 Cal. 180. With us, cities, towns and municipal corporations of all kinds, are created and endowed with powers by the legislature. These are of a legislative and administrative character, to aid in the better government of localities or portions of the state. This power exists no further than it has been delegated. And municipal corporations, in their action, are confined "to a *strict* construction of the grants of powers contained in their charters" or acts of incorporation. *Lafayette v. Cox*, 5 Ind. (Porter) 38, 1854. "It is proper, too, that these powers should be strictly construed, considering with how little care chartered privileges are these days granted." *Bank v. Chilicothe*, 7 Ohio, part II. 31, 35, 1836, *per Hitchcock, J.*; *Collins v. Hatch*, 18 Ohio, 523. "Boroughs and towns are, confessedly, inferior corporations. They act not by any inherent right of legislation, like the legislature of the state, but their authority is delegated, and their powers, therefore, must be strictly pursued. Within the limits of their charter, their acts are valid; *without* it, they are void. *Willard v. Killingworth*, 8 Conn. 247, *per Daggett, J.*, approved 10 *Ib.* 442. "The action of municipal corporations is to be held strictly within the limits prescribed by statute. Within these limits, they are to be favored by the courts. Powers expressly granted, or necessarily implied, are not to be defeated or impaired by a stringent construction." *Smith v. Madison*, 7 Ind. 86; *Kyle v. Malin*, 8 *Ib.* 34, 57, *per Stuart, J.*

account of the complex character of municipal duties, and the various, miscellaneous, and frequently indefinite, purposes or objects which municipalities are authorized to execute or carry into operation.¹

Usage as Affecting Municipal Powers.

§ 56. In England municipal corporations claim and exercise many powers wholly in virtue of long-established *usage*, or of *prescription*, which implies a lost charter conferring such powers.² Indeed, from immemorial usage, powers are recognized as valid, which could not lawfully originate in a royal charter. A usage to give a right must, however, be long established, and forty years' duration was not considered, of itself, to be sufficient for this purpose.³ But usage in this country has a much more limited operation. It seems to be a necessary result of the manner in which our municipal corporations are created, viz: by express legislative act, wherein their powers and duties are wholly prescribed, that the powers themselves cannot be added to, enlarged, or diminished, by proof of usage.

§ 57. In a case in Massachusetts, the learned Chief Justice *Bigelow*, after stating the decision of the Supreme Court, that towns in Massachusetts had no authority to ap-

In concluding this note, the author thinks it pertinent to remark, that the principle of strict construction should not be pressed in any case to such an unreasonable extent as to defeat the legislative purpose fairly appearing upon the entire charter or enactment. Perhaps the rule as it is briefly expressed in the text, best embodies the result of the adjudications upon this point, namely: If, upon the whole, there be fair, reasonable, and substantial doubt whether the legislature intended to confer the authority in question, particularly if it relates to a matter extra-municipal or unusual in its nature, and the exercise of which will be attended with taxes, tolls, assessments, or burdens upon the inhabitants, or oppress them, or abridge natural or common rights, or divest them of their property, the doubt should be resolved in favor of the citizen, and against the municipality. *Infra*, sec. 73.

¹ *Spalding v. Lowell*, 23 Pick. 71; *ante*, secs. 8-11; *post*, chap. VI. where some of these miscellaneous or special powers are considered.

² *Ante*, chap. II. sec. 12; chap. III. sec. 15.

³ *Chad v. Tilsed*, 5 J. B. Moore, 185. As to the proper office of usage in England, both as a source of power and to aid in the interpretation of charters, see Grant on Corp. 19, 27, 28, 29, 552, 564.

propriate money for the celebration of the Fourth of July, remarks, in relation to the attempt to sustain the appropriation on the ground of *usage*: "Usage cannot alter the case. An unlawful expenditure of money by a town cannot be rendered valid by usage, however long continued. Abuses of power and violations of right derive no sanction from time or custom. A casual or occasional exercise of a power by one or a few towns will not constitute usage. It must not only be general, and of long continuance, but, what is more important, it must also be a custom necessary to the exercise of some corporate power, or the enjoyment of some corporate right, or which contributes essentially to the necessities and convenience of the inhabitants. The usage relied on in the present case would not satisfy either of these last-named requisites, which are necessary to give it validity." But general and long-continued usage is not without its importance, and usage of this character may be resorted to in aid of a proper construction of the charter or statute, but no further. If the language be uncertain or doubtful, a uniform, long-established, and unquestioned usage will be regarded by the courts in determining the mode in which powers may be exercised, and to a reasonable extent in determining the scope of the powers themselves; but usage can have no room for operation where the language of the enactment is plain and the legislative intent is clear upon the face of it.¹

¹ Hood v. Lynn, 1 Allen (Mass.), 103, 1861. Further as to usage, consult Willard v. Newburyport, 12 Pick. 227; Spaulding v. Lowell, 23 Pick. 71; Smith v. Cheshire, 13 Gray (Mass.), 308, 1859; Butler v. Charlestown, 7 Gray, 12, 16, 1856; Benoit v. Conway, 10 Allen, 528.

² Smith v. Cheshire, 13 Gray, 308; Butler v. Charlestown, 7 Gray, 12, 16; Sherwin v. Bugbee (validity of school meeting), 16 Vt. 439, 444, where Redfield, J., remarks: "In construing statutes applicable to public corporations, courts will attach no slight weight to the uniform practice under them, if this practice has continued for a considerable period of time." It is a rule "founded on reason and common sense," says the Court of Appeals of Maryland, that "doubtful words in a general statute may be expounded with reference to a general usage; and when a statute is applicable to a particular place only, such words may be construed by usage at that place." Frazier v. Warfield (Inspection Act for Baltimore), 13 Md. 279, 303; S. P. Love v. Hinckley, Abt. Adm. 436; see, also, Rex v. Chester, 1 Maule & Selw. 101; Rex v. Salway, 9 B. & C. 424.

Discretionary Powers not Subject to Judicial Control.

§ 58. Power to do an act is often conferred upon municipal corporations, in general terms, without being accompanied by any prescribed mode of exercising it. In such cases the common council, or governing body, necessarily have, to a greater or less extent, a discretion as to the manner in which the power shall be used.¹ So where the law

Where the true construction of a charter admits of doubt, and the construction adopted by the city authorities has been acquiesced in generally, and acted upon by third persons in good faith, in their transactions with the city, it will be precluded by the courts in actions by such third parties from denying its construction to be the true one. *Van Hostrup v. Madison City* (on railroad bonds), 1 Wall. (U. S.) 291, 1868; *Meyer v. Muscatine* (on railroad bonds), *Ib.* 384, 391. *Post*, sec. 353. Further as to *estoppel*, see chapter on Contracts, *post*. *Post*, secs. 381, 431 n., 433 n., 738 n., 749, 766.

¹ *Railroad Co. v. Evansville* (power to subscribe stock and to borrow money), 15 Ind. 395, 1860; *Kelly v. Milwaukee*, 18 Wis. 83; *Slack v. Railroad Co.*, 13 B. Mon. 1; *Bridgeport v. Railroad Co.*, 15 Conn. 475, 501, 1843, *per Church, J.*; *Harrison v. Baltimore*, 1 Gill (Md.) 264, 1843; *Cincinnati v. Gwynne*, 10 Ohio, 192; *Markle v. Akron*, 14 Ohio, 586. Where a municipal corporation is entrusted with the execution of a power, and is not confined to a particular mode, but has a discretion in the choice of means, a plain case of abuse must be shown resulting in an injury to the petitioner, to warrant an injunction against the corporation. *Page v. St. Louis* (special assessment), 20 Mo. 136, 1853; *Colton v. Hanchett*, 13 Ill. 615; *Mayor of Baltimore v. Gill*, 31 Md. 375; *Holland v. Baltimore*, 11 Md. 186; *Dodd v. Hartford*, 25 Conn. 232; *Sheldon v. School District*, *Ib.* 224; *Lockwood v. St. Louis*, 24 Mo. 20; *Dean v. Todd*, 22 Mo. 19; *Mayor, &c. v. Meserole*, 26 Wend. 132. See chapters on Contracts and Taxation, *post*. *Wells v. Atlanta*, 43 Geo. 67, 1871; *Coulson v. Portland*, Deady R. 481, 1868. *Post*, sec. 741. In respect to the legislative functions of a municipal body, the courts are bound to presume that they will exercise any discretion with which they are clothed properly, and that they had sufficient reasons for doing an act, the result of such discretion. *Railroad Co. v. Mayor of New York*, 1 Hilton, 562, 1858.

By statute in Canada, certain superior courts have power in their discretion to set aside by-laws for illegality on the application of persons interested, but these courts will not entertain an application to set aside a by-law on a matter of fact, which according to municipal act, or a by-law passed under it, should be ascertained and finally determined by an officer of the corporation, unless perhaps fraud or corrupt conduct be imputed to such officer. See *In re Michie and the Corporation of the City of Toronto*, 11 U. C. C. P. 379.

or charter confers upon the city council, or local legislature, power to determine upon the expediency or necessity of measures relating to the local government, their judgment upon matters thus committed to them, while acting within the scope of their authority, cannot be controlled by the courts. In such case, the decision of the proper corporate officers is final and conclusive, unless they transcend their powers.¹ Thus, for example, if a city has power to grade streets, the courts will not inquire into the necessity of the exercise of it, or the refusal to exercise it, nor whether a particular grade adopted, or a particular mode of executing the grade, is judicious.² So if a city has power to build a market-house, the courts cannot inquire into the size and fitness of the building for the object intended.³

§ 59. So, also, where, by its charter, a municipal corporation is empowered, if it deems the public welfare or convenience requires it, to open streets or make public improvements thereon, its determination, whether wise or unwise, cannot be judicially revised or corrected.⁴ On the ground that it is the province of the municipal authorities, and not of the judicial tribunals, to determine what improvements shall be made in the streets and highways of the corporation, the court, on application of citizens, refused to compel a city to cover over an open draining canal of long standing, it "not appearing to be a nuisance in the legal sense of the word."⁵ So where it is made the duty of a city to remove, as far as they may be able, every nuisance which may endanger health, the courts cannot control the manner in which this shall be done.⁶ And

¹ *Baker v. Boston*, 12 Pick. 184; *Hovey v. Mayo*, 43 Maine, 322, 1857; *Fay*, petitioner, 15 Pick. 248, 1834; *Parks v. Boston*, 8 Pick. 218, 1829.

² *Hovey v. Mayo*, street commissioner, 43 Maine, 322, 1857; *Benjamin v. Wheeler*, 8 Gray, 409, 413, 1857.

³ *Spalding v. Lowell*, 23 Pick. 71, 80, 1839.

⁴ *Methodist P. Church v. Baltimore*, 6 Gill. (Md.) 391, 1848. Passing ordinances in relation to opening, &c., of streets, is the exercise of legislative, not judicial, power. *Wiggin v. Mayor, &c. of New York*, 9 Paige, 16, 1841. See chapter on Eminent Domain, *post*.

⁵ *Inhabitants v. New Orleans*, 14 La. An. 452, 1859.

⁶ *Baker v. Boston*, 12 Pick. 184, 1831; see, also, *Kelly v. Milwaukee*, 18

generally, the judicial tribunals will not interfere with municipal corporations in their internal police and administrative government, unless some clear right has been withheld or wrong perpetrated.¹

Public Powers and Trusts Incapable of Delegation.

§ 60. The principal is a plain one, that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as *it* shall judge best, cannot be delegated to others. Thus, where by charter or statute, local improvements, to be assessed upon the adjacent property owners, are to be constructed in "such *manner* as the *common council* shall prescribe" by ordinance, it is not competent for the council to pass an ordinance delegating or leaving to any officer or committee of the corporation the power to determine the mode, manner, or plan of the improvement. Such an ordinance is void, since powers of this kind must be exercised in strict conformity with the charter or incorporating act.² So, where a power, for example, the power to issue

Wis. 83, 1864; *Goodrich v. Chicago*, 20 Ill. 445. Further as to nuisances, see chapter on Ordinances, *post*. Index—*Nuisances*.

¹ *State v. Swearingen*, 12 Geo. 23. *Post*, chap. XXII.

² *Thompson v. Scherrerhorn*, 6 N. Y. (2 Seld.) 92, 1851, relating to grading and leveling streets; affirming S. C., 9 Barb. 152, and approving, in the main, the views there expressed by Mr. Justice *Oady*. Same principle applied in similar case, *Ruggles v. Collier*, 43 Mo. 359, 1869, holding that where the charter gave the city power to require streets to be paved, "in all cases where the *city council* shall deem it necessary," it could not, by ordinance, make the mayor the judge of the necessity for paving. Re-affirmed but distinguished, *Sheehan v. Gleeson*, 46 Mo. 100, 1870; *East St. Louis v. Wehrung*, 50 Ill. 28, 1869. So, where the charter gives the city council power to construct sewers of such "dimensions as may be prescribed by ordinance," the council cannot, by ordinance, require sewers to be constructed of such dimensions as may be deemed requisite by the city engineer. *St. Louis v. Clemens*, 43 Mo. 395, 1869, overruling *St. Louis v. Etera*, 36 Mo. 456. See, further, *State v. New Brunswick*, 1 Vroom (N. J.) 395, 1868; *Meuser v. Risdon*, 86 Cal. 239; *Hydes v. Joyes*, 4 Bush (Ky.) 464; *post*, chapter on Taxation. So, where a charter directed the *common council* to appoint a time when persons interested in an application for opening a street would be heard, the council must itself fix the time, and cannot delegate that duty to the clerk. If it does so, its proceedings will be set aside

licenses, is granted by law, or by an ordinance duly passed, to the mayor *and aldermen*, they are constituted to act as one deliberative body, to the end that they may assist each other by their united wisdom and experience, and the result of their conference be the ground of their determination; and where this is the case, the board of aldermen cannot, even by a vote, delegate the power to the mayor alone.¹ But the principle that municipal powers or discretion cannot be delegated, does not prevent a corporation from appointing agents and empowering them to make contracts, nor from appointing committees and investing them with duties of a ministerial or administrative character.²

Legislative Powers Incapable of Surrender.

§ 61. Powers are conferred upon municipal corporations for public purposes, and as their legislative powers cannot, as we have just seen, be delegated, so they cannot be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which shall cede away, control or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties.³ The cases cited illustrate this salutary prin-

on *certiorari* or other direct proceeding. *State v. Jersey City*, 1 Dutch. (N. J.) 309, 1855; *State v. Jersey City*, 2 *Ib.* 444, 447; *State v. Paterson*, 84 N. J. Law, 163, 1870. A municipal corporation cannot delegate powers conferred upon and to be exercised by it to a street committee or others. *White v. Mayor* (sidewalk assessment), 2 Swan (Tenn.) 364, 1852. See *Smith v. Morse*, 2 Cal. 524; *Oakland v. Carpentier*, 18 Cal. 540; *Whyte v. Nashville*, 2 Swan (Tenn.) 364. *Post*, secs. 567, 618.

¹ *Day v. Green*, 4 Cush. 433, 1849, and cases there cited. Further, as to delegation of power, *Coffin v. Nantucket*, 5 Cush. 269, 1850; *Ruggles v. Nantucket*, 11 Cush. 433; *Clark v. Washington*, 12 Wheat. 40, 54, 1827; *Cooley, Const. Lim.* 204; *Railway Co. v. Baltimore*, 21 Md. 93, 1863.

² *Railroad Co. v. Marion Co.*, 36 Mo. 294; *Schenley v. Commonwealth*, 36 Pa. St. 62. See chapters on Contracts and Corporate Meetings, *post*.

³ *Milhau v. Sharp*, 27 N. Y. 611, 1863; *Ill. &c. Co. v. St. Louis*, 2 Dillon C. C. Rep. 70; *Gale v. Kalamazoo* (market-house contract), 23 Mich. 344, 1871; *Louisville City Railroad Co. v. Louisville*, 8 Bush. (Ky.) 415, 1871; *People's Railroad v. Memphis Railroad*, 10 Wall. 38, 50, 1869; *Presb. Church v. Mayor, &c. of N. Y.*, 5 Cow. 538, 1826; followed, *Stuyvesant v. Mayor*,

ciple in a great variety of circumstances, and, for the protection of the citizen, it is of the first importance that it shall be maintained by the courts in its full scope and vigor.

Mandatory and Discretionary Powers.

§ 62. It often becomes a question whether a duty, imposed by law or charter upon municipal corporations or public officers, is imperative or discretionary. This is a question of legislative intention. The words that a corporation, or officer, "may" act in a certain way, or that it "shall be lawful" to act in a certain way, may be imperative. On this subject the cases sustain the doctrine, that what public corporations or officers are empowered to do for others, and which is beneficial to them to have done, the law holds they ought to do, especially if the law supplies them with the means of executing the power. The power in such cases is conferred for the benefit of others; and the *intent* of the legislature, which is the test in such cases, ordinarily seems, under such circumstances, to be, to im-

&c. of N. Y., 7 Cow, 588; Sav. Fund v. Philadelphia, 31 Pa. St. 175; *Ex parte* Mayor, &c. of Albany, 23 Wend. 277; Railroad Co. v. Mayor, &c., 1 Hilt. 562, 568; Martin v. Mayor, &c., 1 Hill (N. Y.) 545, 1841; Goszler v. Georgetown, 6 Wheat. 593; Sedgw. Const. and St. Law, 634; State v. Graves, 19 Md. 351, 373, 1862; Bryson v. Philadelphia, 47 Pa. St. 329; Cooley Const. Lim. 206; Albany St., 6 Abb. Pr. R. 273; Britton v. Mayor, &c. of N. Y., 21 How. Pr. R. 251; New York v. Second Av., &c. Co., 32 N. Y. 261; Dingman v. People, 51 Ill. 277; Brimmer v. Boston, 102 Mass. 19, 1869; Johnson v. Philadelphia, 60 Pa. St. 445; State v. Cin. Gas Co., 18 Ohio St. 262, 295; Jackson v. Bowman, 39 Miss. 671, 1861; Oakland v. Carpentier, 13 Cal. 540, 1859, opinion of Baldwin, J.; Smith v. Morse, 2 Cal. 524; Louisville City Railway v. Louisville, 8 Bush. (Ky.) 415. *Ante*, sec. 80 and note. Compare Attorney General v. Mayor, &c. of N. Y., 3 Duer, 119, 131, 147; Davis v. Same, 14 N. Y. (4 Kern.) 506, 532; Costar v. Brush, 25 Wend. 628; Brooklyn v. City Railroad Co., 47 N. Y. 475, 1872. One legislature, in the enactment of laws, cannot, by contract, put it out of the power of a subsequent legislature to repeal or amend them; cannot thus surrender a portion of its sovereign power. Dibolt v. Ins. and Trust Co., 1 Ohio St. 564; Plank R. Co. v. Husted, 3 *Ib.* 578, *per* Bartley, C. J., dissenting; Matheny v. Golden, 5 Ohio St. 375; Mott v. Pa. Railroad Co., 30 Pa. St. 9, 1858. But see, in Supreme Court of the United States, Home v. Rouse, 8 Wall. 430, and prior cases cited, and the vigorous dissent, *Ib.* 441, which seems, were the question open, to be the sound view. Cooley, Const. Lim. 127, 280; Sedg. Const. and St. Law, 616, 633. *Post*, secs. 318, 567.

pose a positive and absolute duty. But, under other circumstances, where the act to be done does not affect third persons, and is not clearly beneficial to them or the public, and the means for its performance are not supplied, the words, "may" do an act, or it is "lawful" to do it, do not mean "must," but rather indicate an intent in the legislature to confer a discretionary power.¹ Each case must be largely decided on its own circumstances, and the legislative intent gathered from the whole act.

§ 63. It is, also, sometimes difficult to determine whether specific duties prescribed by the charter or incorporating act rest upon the *corporation*, or *upon the aldermen or other officers* named, in their individual capacity. The question is one of construction. The general rule is

¹ *Mason v. Fearson* (duty of city under tax law), 9 How. (U. S.) 248, 259, *per Woodbury, J.*, and authorities there cited. It is the settled doctrine in New York, that where a public or municipal corporation or body is invested with power to do an act which the public interests require to be done, and the means for its complete performance are placed at its disposal, not only the execution, but the proper execution of the power, may be insisted on as a duty, though the statute conferring it be only permissive in its terms. *Mayor, &c. of New York v. Furze*, 3 Hill, 612, holding corporation liable for omitting its duty to *repair* sewers, although it would not have been liable for omitting to have constructed them originally. *Approved*, 16 N. Y. 162, *note*, *per Selden, J.*; *per Denio, J.*, 9 N. Y. 168, 458; *per Allen, J.*, *Ib.* 461. See, further, the chapter on Actions, *post*, secs. 753, 800-802.

When words are *imperative*, and *when directory*, see further: *Grant Corp.* 34, 35; *Rex v. Mayor, &c. of Hastings*, 5 Barn. & Ald. 592, *note*; *Attorney General v. Lock*, 3 Atk. 164; *Rex v. Mayor, &c. of Chester*, 1 Maule & Sel. 101; *Rex v. Bailiffs, &c.*, 1 Barn. & Cress. 86; 3 *Ib.* 272; *Railroad Co. v. Platte Co.*, 42 Mo. 171; *Railroad Co. v. Buchanan Co.*, 39 Mo. 485; *Grant v. Erie*, 69 Pa. St. 420; *Goodrich v. Chicago*, 20 Ill. 445, authority to city "to remove all obstructions in the harbor," held not imperative, *Ib.* *Ottawa v. People*, 48 Ill. 233; *Carr v. North Liberties*, 35 Pa. St. 324; *Joliet v. Verley*, 35 Ill. 58; *Wilson v. Mayor, &c.*, 1 Denio, 595. An act that "the city council are hereby authorized to elect a recorder, in whom they may vest exclusive jurisdiction of all violations of their ordinances," imposes the duty to elect this officer. The language is injunctive, and not discretionary. *Vason v. Augusta*, 38 Geo. 542, 1868. The expression, in a supplemental charter, "*it shall be lawful*," construed not to enjoin an imperative duty on the corporation. *Seiple v. Elizabeth*, 3 Dutch. (N. J.) 407; *Steines v. Franklin Co.*, 48 Mo. 167, 1871. See *post*, secs. 669-673.

this: that where powers pertaining to the duties of a corporation are conferred upon those who officially represent the corporation, these powers, unless the contrary appear, are deemed to be conferred upon them in their corporate, not their individual, character—in other words, upon the corporation itself.¹

Exemption of Revenues from Judicial Seizure.

§ 64. Municipal corporations are instituted by the supreme authority of a state for the public good. They exercise, by delegation from the legislature, a portion of the sovereign power. 'The main object of their creation is to act as administrative agencies for the state, and to provide for the police and local government of certain designated civil divisions of its territory.' To this end they are invested with governmental powers and charged with civil, political, and municipal duties. To enable them beneficially to exercise these powers and discharge these duties, they are clothed with the authority to raise revenues by taxation and other modes, as by fines and penalties. The revenue of the public corporation is the essential means by which it is enabled to perform its appointed work. Deprived of its regular and adequate supply of revenue, such a corporation is practically destroyed, and the very ends of its erection thwarted. Based upon considerations of this character, it is the settled doctrine of the law that the taxes and public revenues of such corporations cannot be seized under execution against them. Such taxes and revenues cannot be seized either in the treasury or when in transit to it. Judgments rendered for taxes, and the proceeds of such judgments in the hands of officers of the law, are not subject to execution unless so declared by statute. The doctrine of the inviolability of the public revenues by the creditor is maintained, although the corporation is in debt, and has no

¹ *Conrad v. Ithaca*, 16 N. Y. 158, *per Selden*, J., p. 170; *Hickok v. Plattsburg*, 15 Barb. S. C. 427; *Glidden v. Unity*, 10 Fost. (N. H.) 104, 119; *post*, § 778.

² *Ante*, chap. II. secs. 9 11.

means of payment but the taxes which it is authorized to collect.¹

§ 65. Upon similar considerations of public policy, municipal corporations and their officers have usually, though not uniformly, been considered *not to be subject to garnishment*, although private corporations, equally with natural persons, are liable to this process. The cases on the subject, as respects municipal corporations, are referred to

¹ *Edgerton v. Municipality*, 1 La. An. 485, 1846, where the subject is ably discussed in the opinion of *Rost*, J. He says: "On the first view of this question there is something very repugnant to the moral sense in the idea that a municipal corporation should contract debts, and that, having no resources but the taxes which are due to it, these should not be subjected, by legal process, to the satisfaction of its creditors. This consideration, deduced from the principles of moral duty, has only given way to the more enlarged contemplation of the great and paramount interests of public order and the principles of government." *Ib.* 440. *S. P. Municipality v. Hart*, 6 La. An. 570, 1851. This case holds that a judgment in favor of the corporation for a fine incurred for a violation of a municipal ordinance is exempt from execution; but that an *ordinary debt* due the corporation (as on a bond taken for paving) is liable to be seized. But *quære?* In *Edgerton v. Municipality*, *supra*, it was decided that the public taxes and revenues of the corporation could not be seized under execution, notwithstanding the general provision of the Code of Practice of Louisiana, authorizing the seizure, under execution, of "all sums of money which may be due to the debtor in whatsoever right,"—this general language being construed to refer alone to *rights of property*, and not to taxes imposed for the protection of those rights. So in the *Railroad Co. v. Municipality*, 7 La. An. 148, 1852, it was held that perpetual ground rents, created and intended by the legislature to form part of the permanent revenue of the city to enable it to exercise its municipal powers of police and local government, cannot be sold on execution against the corporation.

The public nature of municipal corporations is well illustrated by the decision of the Supreme Court of the United States in the late case of *The United States v. The Baltimore & Ohio Railroad Company*, Dec. Term, 1872. The case involved the right of *Congress* to levy a tax upon the income or property of a municipal corporation; and viewing such a corporation as an arm of the state, and partaking of the state's exemption from liability to be taxed upon the means and instrumentalities employed in conducting its operations, it was held that the tax sought to be enforced under the Internal Revenue Act could not be collected. *Post*, sec. 615 *a*. See chapter on Taxation, *post*. Property owned by a city as an investment of funds merely, held liable to seizure on execution. *New Orleans v. Insurance Co.*, 23 La. An. 61, 1871. *Post*, secs. 446, 686, 693, 712.

in the note, and it will be seen, on examination, that some of them turn on the construction of particular statutes, and that the judges differ in opinion respecting the policy and expediency of subjecting, upon general principles, such corporations to the process of garnishment. The author suggests, where the question is left entirely open by statute, that, on principle, a municipal corporation should be exempt from liability of this character with respect to its revenues and the salaries of its officers, but that where it owes an ordinary debt to a third person, the mere inconvenience of having to answer as garnishee furnishes no sufficient reason for withdrawing it from the reach of the remedies which the law gives to creditors of natural persons and private corporations.¹

¹ The Supreme Court of Pennsylvania is of the opinion that, on principle, a municipal corporation or its officers are not subject to garnishment on attachment or execution, and that, by the statutes of that state, they are not made liable thereto. *Erie v. Knapp*, 29 Pa. St. 173, 1857; *Bulkley v. Eckert*, 3 Barr (Pa.) 368, *per Sargeant*, J.; *S. P. McDougal v. Supervisors*, 4 Minn. 184; *Bradley v. Richmond*, 6 Vt. 121; *Burnham v. Fond du Lac*, 15 Wis. 193, 1862, where the inconvenience of the opposite doctrine is forcibly pointed out by *Paine*, J.; *Drake on Attach.*, sec. 516, 10; *Hadley v. Peabody*, 13 Gray, 200.

In *Missouri*, also, it is held, upon general principles, that municipal corporations are not subject to garnishment on account of salary due to their officers. *Hawthorn v. St. Louis*, 11 Mo. 59, 1847; *S. P. Fortune v. St. Louis*, 23 Mo. 239, 1856, where the decision is placed upon the broad ground that such corporations are not liable to be garnished, and not on the ground that an officer's salary is exempt from such process. See, also, *Neuer v. Fallon*, 18 Mo. 277. Since the first edition of this work the Supreme Court of Missouri has modified in an important respect the broad statement of the doctrine held in the former cases. See *Pendleton v. Perkins and the City of St. Louis*, 49 Mo. 565, 1872. It was there held, after great consideration, that a city corporation in that state is subject to garnishment where the main debtor has absconded so that judgment cannot be obtained against him and he has no property in the state subject to attachment, but has money in the city treasury belonging or due to him, and that it may in such case be reached by bill in equity in the first instance without a previous judgment at law and without showing fraud or other ground of equitable jurisdiction. It was so decided, notwithstanding the garnishment act, in terms, exempts municipal corporations from its operation. The opinion of *Bliss*, C. J., is very full and elaborate.

In *Connecticut*, public officers having money in their hands, to which an individual is entitled, are not subject to garnishment at the suit of the creditors of such individual. *Stillman v. Isham*, 11 Conn. 123, 1835, and cases

cited; *Ward v. County of Hartford*, 12 *Ib.* 404, 408. And in that state, a county, not having power to contract a debt for which an action will lie against it, is not subject to garnishment in such a case. *Ward v. County of Hartford*, 12 Conn. 404. But under a statute enabling towns and cities to contract debts, and which provides that debts due from "any person" to a debtor may be attached, these corporations may be factorized or garnished. *Bray v. Wallingford*, 20 Conn. 416, 1850.

In *Smoot v. Hart*, 33 Ala. 69, 1858, it is held that the marshal of a city may be garnished for city funds in his hands; whether the treasurer could be garnished not decided. *Mayor v. Rowland*, 26 Ala. 498, holds that a municipal corporation cannot be garnished as respects accruing salaries to its officers. See, also, *Clark v. School Com.*, 36 Ala. 621. In *Massachusetts*, a county is not chargeable as a garnishee for jurors' fees. *Williams v. Boardman*, 9 Allen, 570. In *Maryland*, notwithstanding a general statute of the state authorized the garnishment of any "person or persons whatever, corporate or sole," it was held that municipalities were not included, and that, upon general grounds of public policy and convenience, the city could not be garnished in respect of money due from the salaries of its officers, although the officer whose salary was attached could have sued the city therefor. *Baltimore v. Root*, 8 Md. 95, 1855. The city, in this case, was garnished in respect of money due from it to a *police officer*.

But in *New Hampshire*, under a statute making "any corporation possessed of any money" of the debtor subject to garnishment, a town was held to be included. *Whidden v. Drake*, 5 N. H. 13. See *Brown v. Heath*, 45 N. H. 185. In *Iowa*, it was held that the words "debtor or person holding property," in the attachment act, extended to municipal corporations, and that they were subject to garnishment with respect to ordinary debts which they owed the main debtor. *Wales v. Muscatine*, 4 Iowa, 302, 1856. The decision of the court asserts the liability to garnishment on general principles; but subsequently the legislature enacted that "a municipal or political corporation should not be garnished." Rev. 1860, sec. 8196. Requisites of notice to corporation, *Claffin v. Iowa City*, 12 Iowa, 284; *Williams v. Kenney*, 98 Mass. 142. In *Ohio*, under a statute which provides that "any claims or choses in action, due or to become due" to the judgment debtor, or "money which he may have in the hands of any person, body politic or corporate," are subject to execution, salaries of officers of incorporated cities, due and unpaid, may be subjected by the judgment creditors of such officers to the payment of their judgments, and municipal corporations may be garnished with respect to such salaries. The court admits the conflict in the decisions of other states upon similar statutes, but regards the construction above given as being in accordance with public policy and the meaning of the statute. *Newark v. Funk*, 15 Ohio St. 462, 1864. In *Illinois*, municipal corporations are not subject to garnishment in any case, no matter what may be the character of the indebtedness. This position is maintained by *Lawrence, J.*, with great force. *Merwin v. Chicago*, 45 Ill. 183. Waiver. *Clapp & Walker*, 25 Iowa, 315.

CHAPTER VI.

MUNICIPAL CHARTERS.—CONTINUED.

Special Powers and Special Limitations.

§ 66. While municipal corporations are instituted for the same general purposes, heretofore explained,¹ and while there is a striking resemblance in the authority with which they are clothed, yet, except when organized under general acts, the powers given to them are various, both in character and extent.² True policy, indeed, requires, as before suggested, that the powers of these bodies should, in general, be confined to subjects connected with civil government and local administration, but legislatures are usually liberal in grants of this character, and there is no limit to the faculties and capacities with which municipal creations may be endowed, unless that limit is contained in the state constitution.³ The leading powers ordinarily possessed by municipalities, such as those relating to contracts, eminent domain, streets, taxation, ordinances, corporate officers, actions, and the like, will be, hereafter, separately treated. But it will be convenient to notice, in this place, some *special powers* usually or often conferred upon municipalities, and some *special limitations* upon ordinary municipal powers, and the construction which such provisions have judicially received. We shall here consider the following subjects as they relate to municipal corporations: 1. Wharves. 2. Ferries. 3. Borrowing Money. 4. Limitations on the Power to Create Debts. 5. Rewards for Offenders. 6. Public Buildings. 7. Police Powers and Regulations. 8. Prevention of Fires. 9. Quarantine and Health. 10. Indemnifying Officers. 11. Furnishing Entertainments.

¹ *Ante*, chaps. I., II.; *supra*, secs. 63, 64.

² *Ante*, sec. 19.

³ *Aurora v. West*, 9 Ind. 74, 1857; *ante*, chap. IV.

12. Impounding Animals. 13 Party Walls. 14. Public Defence. 15. Aid to Railway Companies.

Wharves.

§ 67. Among the powers of a special and extra-municipal nature frequently conferred by the legislature upon municipal corporations bordering upon the high seas or navigable waters, is the authority to erect wharves, and charge wharfage as a compensation for keeping the same and their approaches in a proper and safe condition for the landing, loading, and unloading of vessels.¹ The authority of the State over navigable waters, and the shores, is, of course, subject to the constitution of the United States, and the laws made in pursuance thereof regulating commerce, and the admiralty jurisdiction of the federal courts.² But although the power to erect wharves and charge wharfage is not strictly one relating to municipalities, it is, nevertheless, competent for the legislature to make them, in such measure as it deems expedient, the repository of it.³

¹ Commonwealth v. Alger, 7 Cush. 53, 82, 1851; Pollard's Lessee v. Hagan, 3 How. (U. S.) 212; Municipality v. Pease, 2 La. An. 588, 1847; Worsley v. Municipality, 9 Rob. (La.) 324; New Orleans v. United States, 10 Pet. 662, 737; The Wharf Case, 3 Bland Ch. (Md.) 383; Ill. &c. Co. v. St. Louis, 2 Dillon C. C. R., 70, 1872.

² State and authorized municipal *pilot and harbor regulations*, when not in conflict with the federal constitution or federal legislation, are valid. Steamship Co. v. Joliffe, 2 Wall. 450; Cooley v. Board of Wardens, 12 How. (U. S.) 296; Pollard's Lessee v. Hagan, 3 *Id.* 212; Cisco v. Roberts, 36 N. Y. 292; Port Wardens v. Ship, &c., 14 La. An. 289, 1859; Same v. Pratt, 10 Rob. (La.) 459; Chapman v. Miller (pilotage fee), 2 Speers (South Car.) Law, 769; Alexander v. Railroad Co. (duty on *tonnage*), 3 Strob. (South Car.) Law, 594, 1847; State v. City Council, 4 Rich. (South Car.) Law, 286; Commonwealth v. Alger, 7 Cush. 53, 82, 1850; Worsley v. Municipality, above cited; Jeffersonville v. Ferry Boat, 85 Ind. 19, 1870. But state enactments, which amount to a regulation of commerce or impose a duty on *tonnage* are, of course, void. Steamship Co. v. Port Wardens, 6 Wall. 31, 1867. See, also, United States v. Duluth, 1 Dillon C. C. 469; Packet Co. v. Atlee, 2 Dillon C. C. R., 1873.

³ Fuller v. Edings, 11 Rich. (South Car.) Law, 239, 1858; Waddington v. St. Louis, 14 Mo. 190, 1851; Baltimore v. White, 2 Gill. (Md.) 444, 1845; Wilson v. Inloes, 11 Gill. & J. (Md.) 351. The owner of a private wharf, whose land is compulsorily taken for a public wharf, is not necessarily en-

It may authorize a municipal corporation to establish a public wharf upon private property on making compensation to the owner of the land; and the power, when conferred upon the municipality, cannot be arrested by an offer on the part of the land-owner himself to erect a wharf.¹

§ 68. Wharves, piers, quays, and landing places, may be either *public or private*. They may be, in their nature, public, although the property be owned by an individual. If *private*, the public have no right to use the erection without the owner's consent, express or implied; if public, they may be used by persons generally upon the payment of a reasonable compensation. Whether they are public or private depends, in case of dispute, upon circumstances, such as the purpose for which they were built, the uses to which they have been applied, the place where located, and the character of the structure.²

§ 69. The keeping of a wharf or dock, erected and opened to the public, like the keeping of an inn, confers a *general license* to boats and vessels to occupy it for lawful purposes—a license which can only be terminated by notice and request to remove the vessel.³ When thus es-

titled to be compensated for *loss of income* from his private wharf, resulting in the establishment of the public wharf near to the private one. *Fuller v. Edings, supra*. The grant of an exclusive right to keep a wharf, in order to secure its erection, does not violate the provision of a state constitution, declaring "that no man or set of men are entitled to exclusive, separate, public emoluments or privileges from the community, but in consideration of public services." Such an improvement is beneficial to the public, and, in order to secure it, the exclusive profits for a given period may be granted to the contractor. *Martin v. O'Brien*, 34 Miss. (5 George) 21, 1857; see, also, *Guiger v. Filor*, 8 Flor. 325, 1859.

¹ *Waddington v. St. Louis*, above cited; *Iron R. R. Co. v. Ironton*, 19 Ohio St. 299, 1869; *Page v. Baltimore*, 34 Md. 558, 1871; *State v. Jersey City*, 34 N. J. Law, 390.

² *Dutton v. Strong*, 1 Black (U. S.) 28, 1861. The owner of a *private* pier may, it was held in this case, cut loose a vessel attached to it without a license if the pier be thereby endangered, no matter how great the stress of the weather or the peril to which the vessel may be thereby subjected.

³ *Heeney v. Heeney*, 2 Denio, 625; *Nicoll v. Gardner*, 13 Wend. 289,

tablished, the owner at common law is, as respects the public, bound to keep it in *good repair*. In view of these obligations on the part of the owner of the wharf, the common law gave him the right to distrain for his wharfage or toll.¹

§ 70. By the common law, the *riparian owner* has the right to establish a wharf on his own soil, this being a lawful use of the land.² The right is judicially recognized in this country, and riparian proprietors on ocean, lake, or navigable river, have, in virtue of their proprietorship, and without special legislative authority, the right to erect wharves, quays, piers, and landing places on the shore, if these conform to the regulations of the state for the protection of the public, and do not become a nuisance by obstructing the paramount right of navigation. This right has been exercised by the owners of the adjacent land from the first settlement of the country. The right terminates at the point of navigability, unless special authority be conferred, because at this point the necessity for such erections ordinarily ceases. Such structures are presumptively lawful where they are confined to the shore, and no positive law is violated in their erection.³

1835; *Lansing v. Smith*, 4 Wend. 9; *Dutton v. Strong*, 1 Black, 28, distinguished from *Heeney v. Heeney*, *supra*.

¹ *Hale de Port. Maria*, 77; *Bradley on Distress*, 133; *Nicoll v. Gardner*, 13 Wend. 289. The right of distress is regulated by statute in the city of New York, and it was there held, that where wharfage accrued in the seventh ward, the owner of the wharf might distrain therefor in the eleventh ward. 13 Wend. 289. See *Lansing v. Smith*, 4 Wend. 9, 21. Wharfage is not properly a *tax*, like that levied to support government, but rather compensation paid by owners of vessels for accommodation for their boats and merchandise. *Swartz v. Flatboats*, 14 La. An. 243, 1859. If a city is entitled to the wharfage from public wharfs, and the owner of a lot adjacent to such wharf receives wharfage, he is liable to the city therefor. *Baltimore v. White* (assumpsit), 2 Gill (Md.) 444. The right, as between private persons and a city corporation, to the moneys collected for wharfage, may be tried in an action for money had and received. *Murphy v. City Council*, 11 Ala. 586, 1847. See *Grant v. Davenport*, 18 Iowa, 179.

² *Nicoll v. Gardner*, 13 Wend. 289, 1835, *per Nelson, J.*; *Lansing v. Smith*, 4 Wend. 9, affirming S. C., 8 Cow. 146; *Heeney v. Heeney*, 2 Denio, 625.

³ *Heeney v. Heeney*, 2 Denio, 625; *Dutton v. Strong* (action of trespass

§ 71. The right of riparian proprietors, in respect to the erection of wharves, are subject to such *reasonable limitations* and restraints as the legislature may think it necessary and expedient to impose. Therefore it is competent for the legislature to pass acts establishing *harbor and dock lines*, and to take away the right of the proprietors to build wharves on their own land beyond the lines, even when such wharves would be no actual injury to navigation.¹

by owner of vessel against owner of private pier for cutting the vessel loose), 1 Black (U. S.) 23, 1861, distinguished from *Heeney v. Heeney*, above cited. Same principle reaffirmed, *Railroad Co. v. Schurmier*, 7 Wall. 272; *Yates v. Milwaukee*, 10 Wall. 497; *State v. Jersey City*, 1 Dutch. (N. J.) 525, 580; *Wetmore v. Brooklyn Gas Co.*, 42 N. Y. 384; *Galveston v. Menard*, 23 Texas, 849; *Grant v. Davenport*, 18 Iowa, 179, *per Wright, J.* But in California, see *Dana v. Jackson, &c. Co.* 81 Cal. 118. As to right to erect wharf by other than riparian owner, on a tidal river, below high water mark, *quære*, see *Hagan v. Campbell*, 8 Port. (Ala.) 9. In this case it is said: "It is clear that no part of such erections can be rested upon the lands of the riparian proprietor, nor can he be excluded from the use of the water, or denied other riparian rights." See *People v. Davidson*, 30 Cal. 379; *Packet Co. v. Atlee*, 2 Dillon C. C. R., 1878.

¹ *Commonwealth v. Alger*, 7 Cush. 53, 1851. This subject is here very fully and learnedly discussed and examined. See, also, *Hart v. Mayor*, 9 Wend. 571, valuable case, affirming 3 Paige, 213; *Wetmore v. Brooklyn Gas Co.*, 42 N. Y. 384; *People v. Vanderbilt*, 26 N. Y. 287; *Same v. Same*, 28 N. Y. 396; *Pollard's Lessee v. Hagan*, 8 How. (U. S.) 212; *Hagan v. Campbell*, 8 Port. (Ala.) 9; *Mobile v. Eslava*, 9 Port. (Ala.) 577, 1839; *Railroad Co. v. Winthrop*, 5 La. An. 86. In *Yates v. Milwaukee*, 10 Wall. 497, Mr. Justice *Miller*, on behalf of the court, speaking of an existing wharf, denied that the city of Milwaukee, under the power to establish dock and wharf lines, could create an artificial and imaginary dock line, hundreds of feet away from the navigable part of the river, and without making the river navigable up to that line, deprive the riparian owners of the right to avail themselves of the advantages of the navigable channel by building wharves and docks to it for that purpose, and said, that if the city deemed the removal of the wharf in question necessary in the prosecution of any general scheme of widening the channel or improving the navigation of the river, it must first make the owner compensation for his property thus taken for the public use.

Municipal control, under legislative grant, over right of riparian owner to wharf out: *Baltimore v. White*, 2 Gill (Md.) 444, 1845; *Wilson v. Inloes*, 11 Gill & J. (Md.) 351. Where, under acts of the legislature, a city had the power to refuse assent to riparian owners to erect wharves, or to allow it upon such terms as they deemed beneficial to navigation and the use of

§ 72. While the riparian proprietor has the right to erect wharves, which are private in their nature, but which may be used by the public by the consent of the owner, express or implied, the right to erect *public* wharves and to demand *tolls* or fixed rates of wharfage is, according to the better view, a franchise, which must have its origin in a legislative grant.¹

§ 72. If a *municipality* is itself a *riparian proprietor*, this will probably give to it, in the absence of any restrictive provision in its organic act, the implied authority to erect a wharf thereon, and it would have the incidental right, the same as a private owner, to charge compensation for its use.²

the port of that city, it was held, that the city might make the grant of the right to erect a wharf upon the condition that its exterior margin should constitute a *public* wharf. *Baltimore v. White, supra.*

¹ *People v. Wharf Company*, 31 Cal. 34; *The Wharf Case*, 3 Bland Ch. (Md.) 383; *Wiswall v. Hall*, 3 Paige Ch. 313; *Houck on Rivers*, sec. 282; *Thompson v. Mayor*, 11 N. Y. 115. See, as to navigator's right to moor and land, *Bainbridge v. Sherlock*, 29 Ind. 364; *Talbott v. Grace*, 30 Ind. 389; *Jeffersonville v. Ferry Company*, 27 Ind. 100; S. C., 35 Ind. 19, 1870. *State Courts* have jurisdiction of suits for wharfage against domestic vessels. *Ib.* 35 Ind. 19, 23; *The Phebe*, Ware Rep. 360; *Russel v. The Swift*, Newb. R. 553; *ex parte Lewis*, 2 Gallis. 483.

² *Murphy v. City Council*, 11 Ala. 586, 1847. The court say: "The title to the wharf is in the city, and, such being the fact, it had the same right as any other proprietor to collect wharfage from those landing goods there. This right, resulting from its proprietary interest, is not a franchise, but a right of property." *Ib. per Ormond, J.*, p. 558. The city of Boston has, under the laws of Massachusetts, the same rights as other littoral proprietors, and was held not to dedicate a dock, which it owned, to the public, by merely abstaining from any control over it. The court observe: "The people of Boston, who owned the land as their common and private property, acted through a corporation (the city), whose corporate grants and licenses are matters of record. Their own use of their own property for their own benefit cannot be called a dedication of it to *any other public of wider extent*. Whether it was called "town dock" or "public dock" (which were used as synonymous terms), it would furnish no ground to presume that they had parted with their right to govern and use it in the manner most beneficial to the people or public of the town or city." *Boston v. Le-craw*, 17 How. (U. S.) 426, 1854, *Commonwealth v. Roxbury*, 9 Gray, 514, 519, and note. *Bona fide* purchaser of a wharf in the city of Baltimore, erected under contract with the city, and in which the city had certain rights, held affected, with notice of those rights. *Baltimore v. White*, 2 Gill (Md.) 444.

Its rights would be the same as those of any similar proprietor, and no greater, unless enlarged by legislative grant.

§ 74. All the *powers of a municipality* in respect to wharves and docks, must, like all its other powers, be derived from the legislature.¹ In regard to private wharves lawfully erected, the municipal authorities have only such powers of local regulation and government as their charters or constituent acts, in general or special terms, confer upon them.² Their own right to erect wharves may be express or implied. The power, even when conferred in terms, is, like other powers, to be construed somewhat strictly when it affects private rights, but not so strictly as to defeat the purpose of the grant.³ Thus, although the corporate boundaries

¹ *Snyder v. Rockport*, 6 Ind. (Porter) 237, 1855; *Railroad Company v. Winthrop*, 4 La. An. 36; *State v. Jersey City*, 34 N. J. Law, 31. While a city may be enjoined, at the instance of a tax-payer, from raising taxes or appropriating money for the unauthorized construction of a wharf, it will not be restrained from exercising a clear power to grade streets, merely because, by such grading, a wharf at the river end of the street will incidentally result. *Snyder v. Rockport*, above cited. As to right of municipal corporation to erect, or allow others to erect, wharf at *terminus* of street, see *Doe v. Jones*, 11 Ala. 63. In *Galveston v. Menard*, 23 Texas, 349, 1859, the right of the city, under a grant from the legislature to build and control wharves in front of the streets is affirmed. In *Newport v. Taylor*, 16 B. Mon. 699, 1855, it was decided that the city might build wharves on property dedicated as a "common," along a navigable river. See also, *Louisville v. Bank*, 3 B. Mon. 144; *Kennedy v. Covington*, 8 Dana, 61. The city of Dubuque, under its charter, was held to have power to prohibit all persons, including riparian owners, from using any place but the public wharf without paying wharfage. *Dubuque v. Stout*, 32 Iowa, 80.

² *Grant v. Davenport*, 18 Iowa, 179, 1865. Where the charter of a city authorizes it "to regulate the erection and repair of *private* wharves and the rates of wharfage thereat," "the city," says *Wright, C. J.*, "may *regulate*, but not destroy; may exercise control as over other private property within its limits, but not to the extent of appropriating the use and enjoyment thereof to the public without compensation. *Ib.* Liability of city corporation for an injury to a private wharf, caused by diverting streams of water to a point near the wharf, thereby causing a great deposit of sand and earth, which lessened the depth of water at the wharf and impaired its value. *Baron v. Baltimore*, 2 Am. Jurist, 203, cited and approved in *Stetson v. Faxon*, 19 Pick. 147, 1858, and see, also, *Thayer v. Boston*, 19 Pick. 510.

³ As to the extent of municipal power over public and private wharves, and the respective rights of the riparian owner and municipal authorities,

may by the charter be extended to low water mark, and the corporation has express power "to regulate the erection and occupation of all wharves or levees within the corporate limits," this does not give the corporation as against the riparian proprietor (whose right was construed to extend to low water mark), the power to control the river bank so as to require such proprietor or his lessee to take out a license for his wharf-boat, fastened to the shore of his own land, and used for business purposes.¹

§ 75. So where a riparian proprietor had constructed a wharf which extended to, but did not encroach upon, the navigable part of the river, and which was not shown to be a nuisance in fact, it was held by the Supreme Court of the United States that the city within which the wharf was situated could not, under the charter power to establish dock and wharf lines and restrain and prevent encroachments upon the river and obstructions thereto, pass an ordinance declaring the wharf to be an obstruction to navigation, and a nuisance, and ordering it to be summarily abated.²

concerning wharves and wharfage: *Grant v. Davenport*, 18 Iowa, 179, 1865; *Cincinnati v. Walls*, 1 Ohio St. 222; *Muscatine v. Hershey*, 18 Iowa, 39; *Galveston v. Menard*, 28 Texas, 348; *Baltimore v. White*, 2 Gill (Md.) 444, 1845; *Furman v. New York*, 5 Sandf. S. C. 16; affirmed, 10 N. Y. 567; *Dugan v. Baltimore*, 5 Gill & Johns. (Md.) 357, 1833; reversing S. C., 3 Bland Ch. 361; *Wilson v. Inloes*, 11 Gill & Johns. (Md.) 358; *Shepherd v. Municipality*, 6 Rob. (La.) 349; *Columbus v. Grey*, 2 Bush (Ky.) 476; *Kennedy v. Covington*, 17 B. Mon. 567; *Commissioners v. Neil*, 3 Yeates (Pa.) 54; *Richardson v. Boston*, 24 How. (U. S.) 188; S. C., 19 *Ib.* 263; 17 *Ib.* 426; *Newport v. Taylor*, 16 B. Mon. 699, 1855; *Commonwealth v. Roxbury*, 9 Gray, 514, 519, and note by Mr. (since Judge) Gray; *Trowbridge v. Mayor* (right of Albany under Dongan charter), 7 Hill (N. Y.) 429; S. C., 5 *Ib.* 71; *Hart v. Mayor*, 9 Wend. 571; *Lansing v. Smith*, 4 Wend. 4; *Thompson v. Mayor*, 11 N. Y. 115; *Marshall v. Guion*, *Ib.* 461; *Corporation v. Scott*, 1 Caines, 543. Principles of construction, *ante*, sec. 55, and notes.

The powers of a municipality in respect to wharfage are subject to the unlimited control of the legislature, except so far as the rights of creditors may be impaired. *St. Louis v. Shields*, Sup. Ct. of Mo., 1873, not yet reported. *Ante*, sec. 41.

¹ *McLaughlin v. Stevens* 18 Ohio, 94, 1849; *Blanchard v. Porter* (extent of riparian right), 11 Ohio, 138, 144; *Muscatine v. Hershey*, 18 Iowa, 39; *Martin v. Evansville*, 32 Ind. 85, 1869.

² *Yates v. Milwaukee*, 10 Wall. 497, 1870.

§ 76. If the right to impose wharfage is given to a municipality, but not limited, the question of the *amount* which the municipal authorities may exact is confided to their discretion, and is one with which the courts cannot interfere,¹ unless, perhaps, in a case where the by-law imposing it is plainly unreasonable. But the amount of tolls or wharfage may, of course, be regulated by the legislature.²

§ 77. The interests of commerce imperatively require that public wharves should be in a *safe condition*; and if a municipal corporation is in possession of such a wharf and exercises control over it, and receives tolls for its use, it owes a duty to the public to keep it in proper and secure condition for use, and it is liable, without statutory enactment to that effect, to an action for any special injuries to boats and vessels caused by its failure to discharge this duty. In such a case it is not material whether the city had adopted ordinances for the regulation of the wharf, or, having such, neglected to enforce them, as in either event the responsibility is the same.³

¹ *Municipality v. Pease*, 2 La. An. 538, 1847; *Muscatine v. Hershey*, 18 Iowa, 39, 42, 1864, *per Wright*, J.

² *Baltimore v. White*, 2 Gill (Md.) 444, 1845; *Murphy v. City Council*, 11 Ala. 586, 1847. Authority to a city "to erect, repair, and regulate wharves and the rates of wharfage," authorizes it to collect wharfage upon goods landed on the bank, the space in front of the city being dedicated to the public, although no artificial wharf was erected. *Sacramento v. Steamer*, 4 Cal. 41. This subject is discussed by *Wright*, J., in *Muscatine v. Hershey*, 18 Iowa, 39, but the point is not decided by the court. *Dubuque v. Stout*, 32 Iowa, 47, 80, 1871. In Kentucky, however, it is held that the owner of the land must build wharves, or improve the shore, or make some preparation for the reception or delivery of goods, or accommodation of vessels, before he is entitled to collect tolls or wharfage. *Columbus v. Grey*, 2 Bush (Ky.) 476. If he permits the municipal authorities to so improve the wharves, he will only be entitled to reasonable compensation for the use of the river bank. *Ib.* The word "quay" defined by *McLean*, J., in *New Orleans v. United States*, 10 Pet. 661, 715.

³ *Pittsburg v. Grier*, 22 Pa. St. 54, 1853. "This case," says *Perley*, C. J., in *Eastman v. Meredith*, 36 N. H. 284, 295, "is put distinctly upon the ground that the public duty, which was the foundation of the action, arose out of the control which the city exercised over the wharf, and the income received for the use of it." That the right to collect wharfage by the city imposes the duty to keep in repair, and a correlative liability, has been often

Ferries.

§ 78. It is not unusual for the legislature to make to a municipal corporation a more or less extensive grant respecting ferries and ferry franchises. Such a grant is not, unless otherwise expressed, a compact which cannot be impaired, but, in the nature of a public law, subject to be repealed or changed, as the public interests may demand.¹ If the legislature has conferred, as in some of the ancient charters in England and in this country, upon a municipal corporation, *its whole power*, to establish and regulate ferries within the corporate limits, the corporation thus representing the sovereign power may make an exclusive grant.² But such a corporation has not an *exclusive* power over the subject, unless, by express words or necessary inference, it be plainly and clearly given to it by the legislature. Hence, power to a municipality to establish and regulate ferries within its limits, does not give it an exclusive power, and consequently does not authorize it to confer an exclusive privilege upon others to establish a ferry.³

determined. *Shinkle v. Covington*, 1 Bush (Ky.) 617, where there was a failure to provide proper fastenings for boats. *People v. Albany*, 11 Wend. 539, 543; *Buckbee v. Brown*, 21 Wend. 110; *Mersey Dock Trustees v. Gibbs*, 1 Law R. H. L. 93. *Lessee of city* is under like liability. *Radway v. Briggs*, 37 N. Y. 256. 1867. In form, the action in such a case against the city may be either *case* or *assumpsit*. *Pittsburg v. Grier*, 22 Pa. St. 54, 1853. But it is no defence to an action by a city for wharfage, that the wharf is not well built and needed further improvement or repairs. *Prescott v. Duquesne*, 48 Pa. St. 118; *Jeffersonville v. Ferry Company*, 27 Ind. 100; Same case, 35 Ind. 19, 1870; *Winpenny v. Phila.*, 65 Pa. St. 135, 1870. Where it was rendered unsafe by acts of others, notice, express or implied, is an element necessary to liability, the same as in the case of defective highways. *Seaman v. New York*, 3 Daly (N. Y.) 147. *Post*, sec. 789.

¹ *East Hartford v. Hartford Bridge Co.*, 10 How. (U. S.) 511, 1850. *Ante*, sec. 40. As to extinguishment of ferry franchise by a subsequent legislative grant to build a bridge at the site of the ferry, and take tolls, see *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420, 1837. Construction of special grant, *Hartford Bridge Co. v. Ferry Co.*, 29 Conn. 210.

² *Costar v. Brush*, 25 Wend. 628, 1841.

³ *Minturn v. Larue*, 23 How. (U. S.) 435, 1859; *Harrison v. State*, 9 Mo. 526, 1845; *McEwen v. Taylor*, 4 G. Greene (Iowa) 532. *Ante*, sec. 55, note.

§ 79. By its charter, a city was empowered "to license, continue, and regulate," as many ferries within its limits, to the opposite shore of a river bounding it, as the public good required, and the common council were further authorized "to direct the manner of issuing and registering the licenses, and to prescribe the *sum of money* to be paid therefor into the treasury of the corporation." Under this, an ordinance prohibiting all persons from ferrying, without a license from the mayor, and authorizing this officer to grant licenses to any person upon payment into the treasury of the city of the sum of the sum of fifty dollars, was sustained against the objections that there was no power to *prohibit* ferrying without a license, and that the license fee was a *tax*. The words of the charter—"To prescribe the sum of money to be paid into the treasury of the corporation,"—were regarded by the court as showing a clear intent to make licenses a source of revenue to the city; and the court added, that the amount charged as a license fee did not appear to be unreasonable.¹

§ 80. If a municipal corporation seized of a ferry, lease the same, through the agency of the mayor and aldermen, with a covenant for quiet enjoyment, this covenant will not restrain the mayor and aldermen from exercising the powers vested in them by statute, to license another ferry over the same waters, if, in their judgment (which cannot be reviewed by the courts), the public necessity and convenience require it. On such a covenant the city may be liable to the covenantees; but the powers vested in the city officers, as trustees for the public, cannot be thus abrogated. If, however, the city, in its corporate capacity, is the legal owner of an *exclusive* franchise, its grantees or lessees would hold it, notwithstanding any license to others, whether granted by the mayor and aldermen or any other tribunal.²

¹ *Chilvers v. People*, 11 Mich. 48, 1862. As to distinction between a license fee and a tax, see *Ash v. People*, 11 Mich. 847, and the chapters on Ordinances and Taxation, *post*, secs. 291, 609. Amount of license city may exact, the state law on the subject being held to affect the city, *Reddick v. Amelia*, 1 Mo. 5, 1821.

² *Fay, Petitioner*, 15 Pick. 248, 1834. The court will not try on *certiorari* the conflicting titles of parties to a ferry franchise. *Ib.* *Ante*, chap. V. sec. 61.

Borrowing Money.

§ 81. We will hereafter treat of the implied power of municipal corporations to issue negotiable securities. But this is a different question from the power to *borrow money*. The power to borrow may be given in express language, in which case the terms and purpose of the grant will measure its extent. But suppose the power is not expressly conferred, does it exist by implication? It is perhaps settled law, that private corporations, organized for pecuniary profit, have, unless specially restricted, an incidental authority to borrow money for their legitimate purposes, and to give the usual obligations for its re-payment.¹ The question of the *implied authority* of municipal corporations to borrow money has not, perhaps, been so often or so thoroughly considered as to be entirely closed to controversy. In view of the legislative practice to confer,

Rights of municipal corporations in connection with ferries and extent of legislative control; see *Fanning v. Gregoire et al.*, 16 How. (U. S.) 524, 1853; *East Hartford v. Hartford Bridge Co.*, 10 *Ib.* 511; affirming S. C., 16 Conn. 149; 17 Conn. 80, 96; *Chilvers v. People*, 11 Mich. 43; *O'Neill v. Police Jury*, 21 La. An. 586; *Aiken v. Railroad Co.*, 20 N. Y. 370, 1859, relating to the ferry rights of the city of Albany; *Benson v. Mayor, &c. of New York*, 10 Barb. 223; *Harris v. Nesbit*, 24 Ala. 398; *United States v. Fanning, Morris* (Iowa), 348; *Conner v. New Albany*, 1 Blackf. (Ind.) 43; *City v. Ferry Co.*, 27 Ind. 100; *Shallcross v. Jeffersonville*, 26 Ind. 193. The right of a city, given by charter, to license and tax ferries, is not, unless so expressed, exclusive of a like right in the state or county. *Harrison v. State*, 9 Mo. 526, 1845. "Power to *regulate* ferries," given to municipal corporations in general incorporation act, construed, *Duckwall v. New Albany*, 25 Ind. 283. When equity will annul lease, *Phillips v. Bloomington*, 1 G. Greene (Iowa) 498. Upon *division* of an old town owning ferry franchise, the new town owns no interest therein except so far as conferred by the legislature. *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149; *post*, Chap. VII.

¹ *Stratton v. Allen*, 16 N. J. Eq. 229; see *ante*, sec. 27, and chapter on Contracts, *post*, sec. 407. But see observations of *Byles, J.*, in *Bateman v. Mid-Wales Railway Co.*, Law Rep. 1 C. P. 510, 1866, as to powers of common-law corporations in respect to drawing, accepting, or indorsing negotiable securities. The court in this case deny (in the absence of express legislative authority conferring the power) that it is competent to a company incorporated in the usual way for the formation and working of a railway to draw, accept, or indorse bills of exchange. •

in terms, all powers so important as this, the dangerous nature of this power by reason of the temptation it holds out to incur needless debts and to make extravagant expenditures, and the facilities it offers for frauds, and the settled and salutary doctrine that such corporations have no powers but such as are expressly conferred, and those which are necessary to effect the objects of the corporation, and those which are incidental to the express grants, the author would be strongly inclined to deny the existence of an *implied power* to borrow money. But it must be admitted that the few express adjudications on the subject favor the contrary opinion.

§ 82. The question arose in Ohio, in 1836, and was fully argued and considered. The town of Chillicothe possessed authority to purchase real estate, erect public buildings, repair streets, and the usual municipal powers. The right to borrow money was *not expressly* granted, and the only question in the case (an action upon the bonds of the town given for borrowed money) was, whether it was granted by implication. The case was regarded as of the first impression, no authorities in point being produced. The court distinctly decided, that in carrying out the express powers, or in effecting any legitimate municipal object, the corporation possessed the *incidental* or *implied* right to borrow money.¹ And subsequently the Supreme Court of Wisconsin affirmed the implied authority of a municipal corporation, as incidental to the execution of the general powers granted by its charter, and in the absence of a special restriction, to borrow money and issue its bonds therefor, it appearing that the proceeds thereof went into the treasury of the city and were expended by it.² “The charter,” says the court, stating its reasons, “does confer the power to purchase fire apparatus, cemetery grounds, etc., to establish markets, and to do many other things, for the execution of which money would be necessary as a means. It would seem, therefore, that in the absence of any

¹ Bank v. Chillicothe, 7 Ohio, part II. p. 31, 1836.

² Mills v. Gleason, 11 Wis. 470, 1860; S. C., 8 Am. Law Reg. 692; State v. Madison, 7 Wis. 688; Clark v. Janesville, 10 Wis. 136.

restriction, the power to borrow money would pass as an incident to these general powers, according to the well-settled rule that corporations may resort to the usual and convenient means of executing the powers granted; for certainly no means is more usual for the execution of such objects than that of borrowing money.” In this case, as in the other, the question was not raised until the money had been borrowed and the right of third persons had attached.¹

¹ *City v. Lamson*, 9 Wall. 477, 486, 1869, where the Wisconsin cases are referred to by *Nelson, J. Ante*, sec. 27, and notes. The right of private corporations generally to *borrow money, as incidental* to the express powers granted, is extensively considered upon principle and authority in the important case of *Curtis v. Leavitt*, 15 N. Y. 9, 1857. See, also, *Barry v. Merch. Ex. Co.*, 1 Sandf. Ch. 280; *Beers v. Phoenix Glass Co.*, 14 Barb. 358; *Stratton v. Allen*, 16 N. J. Eq. 229; *Lucas v. Pitney* (power of railroad company), 8 Dutch. (N. J.) 221; *Fay v. Noble* (manufacturing corporation), 12 Cush. 1; *Davis v. Prop. &c. of Meeting House* (religious corporation), 8 Met. 321. Perhaps it is difficult to draw a distinction between private and municipal corporations in respect to the implied right to borrow money. But we see much more reason for affirming the existence of an incidental power of this kind with respect to trading, banking, manufacturing, and railroad corporations than in relation to municipal corporations. There is a difference between contracting a debt in the prosecution of a legitimate corporate purpose and borrowing money for that purpose. In the one case, the application of the credit is secured to the advancement of the authorized object, while money borrowed is liable to be lost, or to be diverted to illegitimate purposes. It should be remembered, that the express powers can be executed without holding that there is an implied power to borrow money. The revenue provisions of charters supply it with the means designed to furnish it with money. And powers are not held to exist merely because they are convenient. As applicable to municipal corporations, there is great and almost convincing force in the argument of *Selden, J.*, in *Curtis v. Leavitt, supra*, pp. 267, 268. And see *Ketchum v. City of Buffalo*, 14 N. Y. 256, 365, 1856, where the subject is considered by the same judge, and the power of a municipal corporation to contract debts on credit, for legitimate purposes, is admitted to be a question which has “yet to be judicially settled.” See, on the general subject, *Canal Bank v. Supervisors*, 5 Denio, 517, 1848; *Barker v. Loomis*, 6 Hill, 463, 1844; *People v. Brennan*, 39 Barb. 522, 1863. In *Commonwealth v. Pittsburgh*, 41 Pa. St. 278, *Strong, J.*, says, that the power to execute and issue bonds is inseparable from the existence of all corporations, public and private. *Douglass v. Virginia City*, 5 Nevada, 147, 1869. In New York, see Stat. 1853, 1135, chap. 603. In Mississippi, Boards of Police of counties have no implied power to borrow money; and when special power to borrow money is conferred, it must be fairly pursued; and it was held that where a warrant properly signed did not (as required by the statute) state on its face

§ 83. *Express power* to a municipal corporation "to borrow money" includes the power to issue its negotiable bonds, or other usual securities, to the lender.¹ But it does not include the power to issue notes to circulate as money, in violation of the statute law and public policy of the state.²

§ 84. A contract whereby a city agrees with an individual that if the latter will pay or advance the amount of interest due and to become due on certain bonds of the city already issued, the city will pay or refund the amount, is not a "borrowing of money" within the terms or spirit of the charter prohibiting the municipal authorities from borrowing money unless authorized by a prior vote of the citizens; such a contract being one simply for the payment of a debt.³ Under authority to a city to borrow money, it

the object for which it was issued, nor upon what fund drawn, it could not be enforced. *Beamair v. Board of Police*, 42 Miss. 238; 15 Wall. 566. There may be ground for a distinction, as to the implied power to borrow money, between counties and ordinary city corporations.

Recent English Decisions.—Bond for borrowed money, given after the Municipal Corporations Act, held valid: *Pallister v. Mayor, &c.*, 9 C. B. 744; *Payne v. Mayor, &c.*, 3 Hurl. & Nor. 572. See *Nowell v. Mayor, &c.*, 9 Exch. 457; *Kendall v. King*, 17 C. B. 483. Note for borrowed money held invalid under the act: *Attorney General v. Lichfield*, 13 Sim. 547; *Reg. v. Lichfield*, 4 Queen's B. 893. See *Bateman v. Mid-Wales R. W. Co.*, L. R. 1 C. P. 510.

¹ *Commonwealth v. Pittsburg*, 84 Pa. St. 496, 511, 1859; *Railroad Co. v. Evansville*, 15 Ind. 395, 412, 1860; *Middleton v. Allegheny Co.*, 37 Pa. St. 241; *Reinboth v. Pittsburg*, 41 Pa. St. 278; *Seybert v. Pittsburg*, 1 Wall. 272; *Rogers v. Burlington*, 3 Wall. 654, 666, *per Clifford, J.*; *De Voss v. Richmond*, 18 Gratt. (Va.) 338; S. C., 7 Am. Law Reg. (N. S.) 589; *Galena v. Corwith*, 48 Ill. 423, 1868. Money borrowed, and note given by officers of a town, without authority, does not bind the town in case it never receives the benefit of it. *Benoit v. Conway*, 10 Allen, 528; *People v. Supervisors*, 34 N. Y. 516; *Police Jury v. Britton*, 15 Wall. 566.

² *Thomas v. Richmond*, U. S. Supreme Court, December, 1871, 12 Wall. 849.

Construction of the constitutional power of the general government to "borrow money." See *Hepburn v. Griswold*, 8 Wall. 603, and *Knox v. Lee*, December term, 1871, known as the "legal tender cases."

³ *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 221, 1863, *Miller, J.*, dissenting. Where a city can make such a contract, with the sanction of a prior vote,

may, if there be no statutory restriction, make the principal and interest payable at the place where the money is borrowed, or where it pleases, though beyond the limits of the state.¹ Among the powers of a strictly municipal nature conferred upon a city was the power "to borrow money for any object, in its discretion," or "for any public purpose," on a two-thirds vote of the citizens, and this was held, in connection with a general statute of the state recognizing, by implication (as construed), the validity of city and county bonds generally, to authorize such city to issue bonds to aid in the construction of a railway or plank road leading to, through, or from the city.²

Limitation on Power to Become Indebted.

§ 85. Provisions are frequently made in constitutions, or in charters or incorporating acts, to prevent the creation

the sanction will, in an action on such a contract, be presumed until the contrary is shown by the city. *Ib. per Swayne, J.*

¹ *Meyer v. Muscatine*, 1 Wall. (U. S.) 384, 1863. In this case, the court, *per Swayne, J.*, say (1 Wall. 391): "The power of a municipal corporation to make any contract does not depend upon the place of performance, but upon its scope and object. A city authorized to establish gas-works and water-works, and to gravel its streets, may buy water, coal, and gravel beyond its limits, and agree to pay where they are found, or elsewhere. The principal power, when expressed, draws to it, by necessary implication, the means of its execution. This is the settled rule in the construction of all grants of authority, whether to governments or individuals." Express authority to a city "to borrow money," necessarily implies the power to determine the time of payment and to issue bonds, or other evidence of indebtedness, to borrow within or without the state, and to agree to pay where borrowed. *Railroad Company v. Evansville*, 15 Ind. 395, 412, 1860, distinguished as to place of payment from *Prettyman v. Tazwell Co.*, 19 Ill. 406, 22 *Ib.* 147, which were regarded as turning upon peculiar statutory provisions. See, further, chapter on Contracts, *post*.

² *Meyer v. Muscatine*, 1 Wall. (U. S.) 384, 1863, *Miller, J.*, dissenting, in an opinion of marked ability; *Mitchell v. Burlington*, 4 Wall. 270, 1866; *Rogers v. Burlington*, 3 Wall. 654, 1865. General power granted to a city to create a debt will be construed to mean debts for *specified, legitimate, and proper municipal purposes*, and not for any or all purposes, at the discretion of the city council or inhabitants. *Lafayette v. Cox*, 5 Ind. (Porter) 38, 1854. Limitation on taxing power does not limit power to contract debts. *Emerson v. Blairsville*, 2 Pittsb. (Pa.) Rep. 39. *Post*, sec. 107. See, further, chapter on Contracts, *post*.

or increase of municipal indebtedness beyond certain limits, or except upon certain conditions. The judicial construction of some of these provisions will be noticed in this place. The constitution of Maryland contains a provision that "No debt shall be created by the mayor and city council of Baltimore" (except for specified temporary purposes), unless it shall be first sanctioned by the legislature and approved by the voters of the city. The city being the owner of a large amount of stock in the Baltimore and Ohio Railroad Company, without previous legislative authority or the approval of the voters, passed an ordinance to provide for the *raising* of one million of dollars, by hypothecating its railroad stock, and for the investment of the same in the bonds of another railroad company in process of construction. The validity of this ordinance being drawn in question, the court considered it to be plain, that the constitutional provision quoted was intended to prohibit the city from aiding in the construction of works of internal improvement without the previous assent of the legislature and of a majority of the voters of the city; and that the ordinance (notwithstanding the ingenious use of the phrase *raising* instead of *borrowing* money, and the further provision that the parties furnishing the money should look for its repayment exclusively to the stock pledged, and that the city should not be responsible for any deficit) did create a debt within the meaning of the constitution, and was therefore void.¹

§ 86. Under a charter prohibiting the common council of a city from "authorizing any expenditure, for any purpose," in the current political year, exceeding the amount of the annual tax levy, the council cannot authorize any expenditure to be made within the year exceeding the limit; but they are not forbidden to authorize, in that year, an expenditure to be made in a subsequent year, for services to be performed in such subsequent year.²

¹ Baltimore v. Gill, 31 Md. 375, 1869. That a debt may be *created* by borrowing money, although there be a provision exempting the borrower from liability beyond the property pledged, see Newell v. People, 3 Seld. 9, 87.

² Weston v. Syracuse, 17 N. Y. 110, 1858. See, also, Cook v. City of Buf

§ 87. A municipal charter provided that it should not be lawful for the city council to make, or authorize to be made, "any contract for the payment of money *beyond the current fiscal year*," declaring every such prohibited contract "illegal and void." In construing this language the court say: "By this section of the charter, the legislature have, in the most explicit manner, prohibited the city council from contracting any debt beyond the fiscal year. If the city council had, at the time the contract was made, in 1845, passed an ordinance that the expense of lighting the streets of the city for that year should be paid in 1848, by a tax *then* assessed for that purpose, it would have come within the letter of the prohibition. It is none the less a violation of its spirit, that the council did not pass the ordinance providing for its payment until 1848."¹

§ 88. If a municipal corporation has the means in its treasury to meet its indebtedness, the issue of warrants to an amount larger than five per cent. of its taxable property is not a violation of the section of the state constitution which provides that "no municipal corporation shall be allowed to become indebted, in any manner or for any purpose, to an amount exceeding five per cent. of the taxable property within the corporation." In such case it would not become indebted within the meaning of the constitutional clause.² An act of the legislature prohibiting counties and

falo, 1 Clinton's N. Y. Digest, "Buffalo," sect. 2. Limitation on rate of tax to be annually levied construed. *State v. Mayor*, 23 La. An. 358. The charter of a city provided that "no *funded debt* shall be contracted." It was *decided*, that a city bond, issued on time, for the purchase of market grounds, was not a funded debt. *Ketchum v. Buffalo*, 14 N. Y. 356. Meaning of "funded debt" and "funding" considered by *Seklen, J.*, *Ib.* p. 367, and by *Wright, J.*, p. 378. City may *fund* valid debt and issue its bonds therefor, without express authority. *Galena v. Corwith*, 48 Ill. 423, 1868. How fund, *Smith v. Morse*, 2 Cal. 524. *Ante*, secs. 41, 36; 15 Wall. 566.

¹ *Per Caldwell, J.*, *Jonas v. Cincinnati*, 18 Ohio, 318, 322, 1849. Construction of similar provision in other charters: *Goodrich v. Detroit*, 12 Mich. 279; *Philadelphia v. Flanigen*, 47 Pa. St. 21; *Johnson v. Philadelphia*, *Ib.* 382; *Wallace v. San Jose*, 29 Cal. 180; *Bladen v. Philadelphia*, 60 Pa. St. 464, construing an act applying to the city to the effect that no debt shall be binding unless authorized by law or ordinance, and a sufficient appropriation therefor be made.

² *Dively v. Cedar Falls*, 27 Iowa, 227, 1869. A contract by the corpo-

cities from thereafter "contracting any debt or pecuniary liability, without fully providing, in the ordinance creating the debt, the means of paying the principal and interest of

ration to pay for work when it shall be performed, in the future, does not constitute an indebtedness, within the meaning of this provision of the constitution, until the performance of the work. *Ib.* But *quære*. See *Davenport, &c. Gas Co. v. Davenport*, 13 Iowa, 229. A similar provision exists in the constitution of Illinois and of some other states. The meaning and effect of the Iowa constitution, quoted above, were much discussed before the Supreme Court of Iowa, in a very recent case, in which the question was, Is a city corporation liable to a *bona fide* holder, upon its negotiable bonds issued for value, when at the time of such issue the city was indebted to the full extent of the constitutional limit? The cause was settled before being decided, and no opinions were filed; but the judges differed in their judgment. In the *Western Jurist* (vol. VI. p. 1, January, 1872), will be found two able and interesting articles upon the question above stated, containing the arguments upon both sides of it—the one being prepared, as it is understood, by Mr. Justice *Beck*, and the other by Mr. Justice *Cole*, of the Supreme Court of Iowa. The proposition upon which they differ is whether the *power* given to a city to issue its bonds, absolutely ceases as to innocent holders, the moment the constitutional limit is reached, the same as if it had never been conferred. In view of the language shall not "be allowed;" the course of decision in the United States Supreme Court, elsewhere noticed, protecting the holders of this class of securities; and the impracticability, and even impossibility, of purchasers ever to ascertain, at a given moment, the amount of indebtedness of a corporation, the author, while appreciating the difficulties of the question, is inclined to think that if the power to issue negotiable securities be given, and the inhabitants stand by and allow such bonds to be issued, for value received by the corporation, and sold, that it should be held liable thereon. If the bonds are void, and the city has received value, it would be liable to pay back what it had received from innocent persons, or else the provision of the constitution would operate to ensnare and defraud those who deal with it; and, if thus liable, the constitutional limit may be exceeded in this way, as well as by sustaining the right to recover on the bonds.

The provision of the Iowa constitution, above quoted, was further expounded in the late case of *Grant v. Davenport*, April term, 1873, not yet reported, which involved the validity of a contract by the city to supply itself with water; and it was held that where a contract made by a municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenues and such special taxes as it may legally, and in good faith intends to levy therefor, such contract does not constitute "the incurring of indebtedness" within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts.

The charter of the City of Portland, Oregon, prohibited the city from contracting an indebtedness exceeding \$50,000; and it was held by Judge

the debt so contracted," does not extend to ordinary street work, which forms part of the current expenses of the corporation, and which may be paid out of its current revenues.¹

§ 89. A restrictive provision in a city charter, that the "council shall not create, or permit to accrue, any debts or liabilities which shall exceed" a specified sum, unless a certain course be pursued by the council and approved by a vote of the people, has been considered to have no relation to liabilities arising *ex delicto*, or to those which the law may cast upon the corporation, and to apply, at most, only to contracts or liabilities voluntarily created. The court, indeed, regarded the provision as directory simply, and not as limitation on the power of the council to create debts.²

But in another case a provision in a city charter that the council shall not have power to pledge the credit of the city for more than a specified sum without submitting the question to the voters of the city was regarded as a definite restriction on the power; and hence a statute authorizing the city to issue bonds to defray the expenses of building a bridge is subordinate to, and does not override, the restriction in the charter.³

§ 90. Constitutional limitations on *state* indebtedness apply to the state alone, and not to her political and municipal subdivisions.⁴ A legislative provision prohibiting the

Deady that an ordinance assuming a liability of \$350,000, to be paid in semi-annual instalments extending through twenty years was in violation of the charter, and this although the ordinance made provisions for the payment of such instalments as they fell due by the levy of taxes for that purpose. *Coulson v. Portland, Deady*, 481, 1868.

As to constitutional provision requiring the legislature to *restrict* the power of municipalities to levy taxes, borrow money, &c. see, *ante*, chap. III. sec. 27.

¹ *Reynolds v. Shreveport*, 13 La. An. 326, 1858.

² *McCracken v. San Francisco*, 16 Cal. 591, 1860.

³ *Cumberland v. Magruder*, 34 Md. 381, 1871. But see *Butz v. Muscatine*, 8 Wall. 575, 1869. *Post*, sec. 107.

⁴ *Pattison v. Supervisors*, 13 Cal. 175, 1860; *Cass v. Dillon*, 2 Ohio St 607, 1853; *Slack v. Railroad Company*, 13 B. Mon. 16; *Clark v. Janesville* 10 Wis. 136; *Prettyman v. Supervisors*, 19 Ill. 406. See *People v. Super*

city authorities from incurring an indebtedness beyond a designated amount, does not apply to the legislature of the state; and the latter may, of course, by a subsequent act, authorize an increase of the amount.¹

Rewards for Offenders.

§ 91. The governing body of a municipal corporation (which has power to protect the property and promote the welfare of its inhabitants), may offer a reward for the detection of offenders against the general safety of its people, as, for example, those guilty of the crime of arson within the corporate limits.² If made by the mayor, it may be ratified by the city council subsequently, and is binding upon the city, though not so ratified until after the performance of the service for which the reward is claimed.³ A promise to reward an officer for doing that which, without such reward, it was his duty to do, is void. Such a promise is, on general principles, *without consideration*,

visors, 16 Mich. 254, and Mr. Justice *Lowe's* individual opinion—not the court's—in *State v. County of Wapello*, 13 Iowa, 388, 418–422; *Dubuque County v. Railroad Company*, 4 G. Greene, 1; *Dean v. Madison*, 7 Wis. 688.

¹ *Amey v. Allegheny City*, 24 How. (U. S.) 364, 1860. Construction of particular limitation: *Id.* See, on the general subject, *Wallace v. Mayor*, 29 Cal. 180; *Wyncoop v. Society*, 10 Iowa, 185; *Rice v. Keokuk*, 15 Iowa, 579; *Gibbon v. Railroad Company*, 36 Ala. 410; *Foote v. Salem*, 14 Allen, 487; *Dunnova v. Green*, 57 Ill. 30.

² *York v. Forscht*, 23 Pa. St. 391, 1854; *Crawshaw v. Roxbury*, 7 Gray, 374, 1856. Such an offer is not void for ambiguity, and entitles a person to the reward who gives information to the police officers of the city upon which the incendiary is arrested, he being afterwards convicted. The power of towns in Maine to offer rewards denied; *Gale v. South Berwick*, 51 Maine, 174. See *Lee v. Flemingsburg*, 7 Dana, 59.

³ *Crawshaw v. Roxbury*, *supra*. Under a statute authorizing the mayor and city council of any city, or the selectmen of any town, to offer and pay from the treasury of such city or town a suitable reward, not exceeding \$300, for apprehending and securing a person charged with a capital or other high crime, any city or town may be bound by an offer of a reward in such cases; and city person who performs the service, relying upon such offer, may, in action of *assumpsit*, recover the amount offered of such city or town. *Janvrin v. Exeter*, 48 N. H. Requisites of declaration where reward is offered by a town, see *Codding v. Mansfield*, 7 Gray, 272.

if, indeed, it be not illegal.' Therefore, a watchman of a city, who, while in the discharge of his duty as such, discovers a person in the act of committing a crime, cannot recover from the city a reward offered by it.'

Public Buildings.

§ 92. Power to the officers or to one of the departments of a municipal corporation, to provide for repairs to public buildings, does not give authority to *erect* a new building, and certainly not a large and expensive edifice.' But power to a municipal corporation to rebuild or repair carries with it the right to determine plan and mode.'

Police Powers and Regulations.

§ 93. Many of the powers most generally exercised by municipalities are derived from what is known as the *police power* of the state, and are delegated to them to be exercised for the public good. Of this nature is the authority to suppress nuisances, preserve health, prevent fires, to regulate the use and storing of dangerous articles, to establish and control markets, and the like. These and other

¹ *Stotesbury v. Smith*, 2 Burr. 924; 3 Kent Com. 185; *Harris v. Watson*, Peake, 72; *Stilk v. Myrick*, 2 Campb. 317; *Bridge v. Cage*, Cro. Jac. 103. See chapter on Corporate Officers, *post*, secs. 172, 173.

Pool v. Boston, 5 Cush. 219, 1849; *Gilmore v. Lewis*, 12 Ohio, 281; *Means v. Hendershott*, 24 Iowa, 78; Chap. IX. *post*.

² *Peterson v. Mayor, &c.*, 17 N. Y. 449, 455, *per Denio*, J. Contract between city and county in respect to public buildings: *Bergen v. Clarkson*, 1 Halst. (N. J.) 352, 1796; *De Witt v. San Francisco*, 2 Cal. 289, 1852.

³ *Ely v. Rochester*, 26 Barb. 133, 1837. As to power to build *town house*. *French v. Quincy*, 3 Allen, 9. Incidental power to provide suitable accommodations for the transaction of the business of the corporation. *People v. Harris*, 4 Cal. 9; see *Vanover v. Davis*, 27 Geo. 354; chapter on Corporate Property, *post*. Council have power to fit up and furnish the room in which they meet, and the court refused to enjoin them from furnishing the council chamber with portraits of the governors of the state. *Reynolds v. Mayor of Albany*, 8 Barb. 597; *People v. Harris*, 4 Cal. 9; but see *Hodges v. Buffalo*, 2 Denio, 110; *Stetson v. Kempton*, 13 Mass. 272, 1816, *per Parker*, C. J. *Proper uses of public buildings*: *Scofield v. School District*, 27 Conn. 499; *French v. Quincy*, 3 Allen, 9. *Market Houses*, *post*, secs. 313-318, 432, 510.

similar topics will be considered in appropriate places. But it may here be observed, that every citizen holds his property subject to the proper exercise of this power, either by the state legislature directly, or by public corporations to which the legislature may delegate it. Laws and ordinances relating to the comfort, health, convenience, good order, and general welfare of the inhabitants, are comprehensively styled, "Police Laws or Regulations." And it is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. The citizen owns his property absolutely, it is true; it cannot be taken from him for any private use whatever, without his consent, nor for any public use without compensation; still he owns it subject to this restriction, namely: that it must be so used as not to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors or the citizens generally. These regulations rest upon the maxim, *salus populi suprema est lex*. This power, to restrain a private injurious use of property, is very different from the right of eminent domain. It is not a taking of private property for public use, but a salutary restraint on a noxious use by the owner, contrary to the maxim, *sic utere tuo ut alienum non lædas*.¹

¹ *Baker v. Boston*, 12 Pick. 184, 1831 (as to nuisances); *Wadleigh v. Gillman*, 12 Maine, 403 (as to wooden buildings); *Vanderbilt v. Adams*, 7 Cowen, 349 (as to harbor regulations, where the general principle upon which police laws rest, is very satisfactorily discussed by *Woodworth, J.*); *Commonwealth v. Alger*, 7 Cush. 53, 84 (valuable opinion by *Shaw, C. J.*); *Coates v. Mayor, &c. of New York*, 7 Cowen, 585 (as to ordinance prohibiting the interment of the dead within the city); *Goszler v. Georgetown*, 6 Wheat. 181 (as to power to grade). Speaking of turnpike acts, paving acts, &c., Lord Kenyon, in the case of the Governor, &c. *v. Meredith*, 4 Term Rep. 790, 796, says: "Some individuals suffer an inconvenience under all these acts of parliament; but the interests of individuals must give way to

Prevention of Fires.

§ 94. The prevention of damage by fire is usually an object within the scope of municipal authority, either by express grant or by the power, in a chartered town or city, to make police regulations or needful by-laws. And where such is the case, the town or municipal body is authorized to appropriate money for the purchase of engines, or for the repair thereof, if used for the purpose of extinguishing fires therein; and this, whether they belong to the corporation or were purchased by private subscription.¹ And money may also be appropriated for the benefit of engine and hook and ladder companies therein.²

Quarantine and Health.

§ 95. The preservation of the public health and safety is often made a matter of municipal duty, and it is competent

the accommodation of the public." And *per Buller, J.*, in same case: "There are many cases in which individuals sustain an injury, for which the law gives no action; for instance, pulling down houses, or raising bulwarks, for the preservation and defence of the kingdom against the king's enemies." But "the law will not allow the right of property to be invaded, under the guise of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation." *Per Wilde, J.*, in *Austin v. Murray*, 16 Pick. 126; *Greene v. Savannah*, 6 Geo. 1, 1845; *People v. Hawley*, 3 Mich. 330; *Ames v. County*, 11 Mich. 139. The extent of the police power will be further discussed in the chapter on Ordinances, *post*. See, also, *Cooley Const. Lim.* 572-594. How far and when, cities, in executing police duties, are agents of the state, and not of the municipality. See *Buttrick v. Lowell*, 1 Allen, 172; *Mitchell v. Rockland*, 51 Maine, 118, 122; *State ex rel. &c. v. St. Louis Court*, 34 Mo. 356; *White v. Kent*, 11 Ohio St. 550; *Thomas v. Ashland*, 12 *Ib.* 127; *City Council v. Payne*, 2 Nott & McCord (South Car.), 475; *People v. Hurlburt*, 24 Mich. 44, 1871. *Ante*, sec. 34. *Post*, secs. 191, 326, 329, 609.

¹ *Allen v. Taunton*, 19 Pick. 485, 1837; *Huneman v. Fire District*, 37 Vt. 40; *Robinson v. St. Louis*, 28 Mo. 488 (repair of engine house); *Wadleigh v. Gillman*, 12 Maine, 403; *Vanderbilt v. Adams*, 7 Cowen, 349, 352; *post*, secs. 338, 442 n., 545, 756-759, 774.

² *Van Sicklen v. Burlington*, 27 Vt. (1 Wma.) 70, 1854. Approving, *Allen v. Taunton*, *supra*. See *post*, chapter on Ordinances. Power of council over fire companies, and to appoint officers therefor. See *Miller v. Savannah Fire Co.*, 26 Geo. 678.

for the legislature to delegate to municipalities the power to regulate, restrain, and even suppress, particular branches of business, if deemed necessary, for the public good.¹ The subject will be considered more in detail in the chapter on Ordinances. The general nature and scope of the authority as it is not unfrequently bestowed, are well illustrated by a case in Maryland. By its charter the city of Baltimore was vested with "full power and authority to enact all ordinances necessary to preserve the health of the city, prevent and remove nuisances, and to prevent the introduction of contagious diseases within the city and within three miles of the same." Commenting on this provision of the charter, the Court of Appeals say: "The transfer of this salutary and essential power is given in terms as explicit and comprehensive as could have been used for such a purpose. To accomplish, within the specified territorial limits, the objects enumerated, the corporate authorities were clothed with all the legislative powers which the general assembly could have exercised. Of the degree of necessity for such municipal legislation, the *Mayor and City Council of Baltimore* were the exclusive judges. To their sound discretion is committed the selection of the means and manner (contributory to the end) of exercising the powers which they might deem requisite to the accomplishment of the objects of which they were made the guardians. 'To prevent the introduction of contagious diseases within the city, and within three miles of the same,' they might impose heavy penalties on the captain, owner, or consignee of any ship or other vessel entering the port of Baltimore, on board of which small pox or other contagious diseases might prevail, or they might seek the accomplishment of their object by causing the vessel and all persons to be taken possession of and controlled until their purification and disinfection were effected, and impose on the captain, owner, or consignee, the payment or reimbursement of all the expenses incurred by such proceedings; or they might adopt, at the same time, both suggested remedies, if for the successful and

¹ Shrader, *Ex parte*, 33 Cal. 279, 1867; *Asbrook v. Commonwealth*, 1 Bush (Ky.) 139, 1866; *Tucker v. Virginia City*, 4 Nev. 20. *Post*, secs. 808, 805, 806, 775.

faithful execution of their powers they deemed it necessary to do so.”¹

§ 96. And it was held, that, under this authority, it was competent for the city to pass an ordinance providing for the appointment of a “health officer,” prescribing his duties and powers; and that the city might recover from the consignee of a vessel, and was not confined to the charterer, the expenses incurred by it in disinfecting and purifying the vessel, persons, and baggage on board of her at the time of her arrival, from the infection of the small pox. Respecting the extent of liability, the court decided, that the defendant was not entitled to an instruction that the recovery must be limited to the amount of expenses absolutely necessary to preserve the health of the city, or to prevent the introduction of the small pox. On this point the court expressed its judgment to be that, “if the health officer” (on whom the duty of disinfecting the vessel was imposed by ordinance), in causing expenses, “acted *bona fide*, within the limits of a sound discretion, and with reasonable skill and judgment, in the discharge of his official duties, the reasonable expenses thus incurred must be paid.” Concerning the power of the corporation over the persons on board of an infected vessel, the court was of opinion, that it was competent for the health officer to be authorized, by ordinance, to send persons laboring under infectious disease to the hospital, and also those on board of the vessel liable to be affected by the disease, if, in his opinion, such a course be necessary to prevent the spread of disease; and the owner, master, or consignee may be liable for expenses thus incurred, if the health officer acts with reasonable skill and judgment, and exercises a sound and honest discretion.”

§ 97. A city having power to pass ordinances respecting the *police* of the place, and to preserve *health*, is authorized, as a sanitary and police regulation, to contract to procure a *supply of water*, by boring an artesian well, or otherwise, on the public square, and is the judge of the mode best adapted to accomplish the object.”²

¹ Harrison v. Baltimore, 1 Gill (Md.) 264, 1843. *Ante*, sec. 58.

² Harrison v. Baltimore, 1 Gill (Md.) 264, 1843.

³ Livingston v. Pippin, 31 Ala. 542, 1858. As to water-works: Rome v.

Indemnifying Officers.

§ 98. Where a municipal corporation has no interest in the event of a suit, or in the question involved in the case, and where the judgment therein can in no way affect the corporate rights or corporate property, it cannot assume the defence of the suit, or appropriate its money to pay the judgment therein; and warrants or orders based upon such a consideration are void.¹ But a municipal corporation has power to indemnify its officers against liability which they may incur in the *bona fide* discharge of their duties, although the result may show that the officers have exceeded their legal authority.² Thus, it may vote to defend suits brought against its officers for acts done in good faith in the exercise of their office.³ So, if a public corporation is charged with the duty of repairing highways, and is made liable for de-

Cabot, 28 Ga. 50; *Hale v. Houghton*, 8 Mich. 458. A municipal corporation owning lands on a watercourse, distant from the city, to supply its inhabitants with water, has no right (unless acquired by purchase or by the exercise of the right of eminent domain) to divert water to the injury of other riparian proprietors. *Stein v. Burden*, 24 Ala. 130, 1854; *Fleming's Appeal*, 65 Pa. St. 444; *ante*, sec. 13.

¹ *Halstead v. Mayor, &c. of N. Y.*, 3 Comst. 430, 1850, affirming S. C., 5 Barb. 218, and deciding that corporate funds cannot be appropriated to pay penalties personally incurred by officers for refusing to discharge their official duties; refer to, in explanation, *Morris v. The People*, 3 Denio, 381. And see, also, *People v. Lawrence*, 6 Hill, 244, holding that the supervisors of a county had no right to appropriate money to defray the costs of a justice of the peace who had been prosecuted for official misconduct and acquitted; recognized in *Bank v. Supervisors*, 5 Denio, 517, 521. Same principle, *Merrill v. Plainfield*, 45 N. H. 126. In Canada it is held that a municipal corporation cannot pass a by-law to pay the costs of a contested election to a municipal office, nor indemnify one of the parties to such a contest. In *re Bell, &c.*, 2 Upper Can. Com. Pleas Rep. 507; S. C., 3 Ib. 400.

² *Pike v. Middleton* (indemnifying tax collector), 12 N. H. 278, 1841; *Fuller v. Groton*, 14 Gray, 340; *Sherman v. Carr* (indemnifying executive officer), 8 R. I. 431, 1867; *Briggs v. Whipple*, 6 Vt. 95, 1834; *Bancroft v. Lynnfield*, 18 Pick. 566, 1836; *Nelson v. Milford*, 7 Pick. 18, 26, 1828; *Babbitt v. Savoy*, 3 Cush. 530, 1849; *Hasdell v. Hancock*, 3 Gray, 526, 1853. In *Page v. Frankford*, 9 Greenl. 155, this was left an open question.

³ *Ib.* *Baker v. Windham*, 13 Maine (1 Shep.) 74, 1836.

fects therein, it has the *incidental* power to indemnify an officer who digs a ditch for the purpose of raising a legal question as to the bounds of the highway.¹

§ 99. So, a vote by a town to refund money paid by assessors on an illegal assessment of a *town* tax made by them, is an express promise, founded upon a meritorious and legal consideration, and is irrevocably binding upon the town. And this, although, without such vote, the town could not have been compelled to refund or indemnify the assessors. But such a vote, by a town, would be without consideration in respect to *state* and *county* taxes.² So, if the town is not concerned, having nothing to lose or gain in the result of the litigation, a vote to indemnify an officer would be in excess of its power, and void;³ but it would be otherwise if the suit against the officer was in respect to matters in which the corporation was interested.⁴

Furnishing Entertainments.

§ 100. Without express power, a public corporation cannot make a contract to provide for celebrating the Fourth of July, or to provide an entertainment for its citizens or guests. Such contracts are void, and although the plaintiff complies therewith on his part, he cannot recover of the corporation.⁵

¹ Bancroft v. Lynnfield, *supra*.

² Nelson v. Milford, 7 Pick. 18, 1828. A separate action, on such a vote, lies against the town in favor of each assessor for his share, which does not include, however, his own tax, paid by him voluntarily. *Ib.*

³ Vincent v. Nantucket, 12 Cush. 105, 1853. "A promise to indemnify a tax collector if he would collect, by pretense of his official authority, a tax which he knew was illegal, would be an agreement to violate the law, and could not be enforced." Pike v. Middleton, 12 N. H. 281, *per Gilchrist, J.* Selectmen, under their authority "to order and manage all of the prudential affairs of the town," may bind the town thus to indemnify its officers. 12 N. H. 281, *supra*; *ante*, sec. 18, and notes.

⁴ Briggs v. Whipple, 6 Vt. 95, 1834.

⁵ Hodges v. Buffalo, 2 Denio (N. Y.) 110, 1846. Same principle: Cornell v. Guilford, 1 Denio, 510; Hood v. Lynn, 1 Allen (Mass.) 103, 1861; Gerry v. Stoneman, *Ib.* 319. Nor to celebrate surrender of Cornwallis: Tash v. Adams, 10 Cush. 252, 1852. Nor can towns in Massachusetts vote money for the purchase of uniforms for an artillery company: Clafin v.

Impounding Animals.

§ 101. Power to *impound and forfeit* domestic animals must be expressly granted to the corporation, and laws or ordinances authorizing the officers of the corporation to impound, and, upon taking specified proceedings, to sell the property, are penal in their nature, and where doubtful in their meaning will not be construed to produce a forfeiture of the property, but rather the reverse. And the pound-keeper cannot justify in an action brought against him by the property owner unless he has strictly complied with all the requisites of the law under which he acts. Thus, if he sells without giving the requisite notice, or for the full length of time required, he is liable, although the owner sustains no actual injury from the omission, or the owner may treat the sale as void and recover his property.¹

Hopkinton, 4 Gray, 502, 1855. "Corporations," says *Jewett*, J., in *Hodges v. Buffalo*, 2 Denio, 110, have no other powers than such as are expressly granted, or such as are necessary to carry into effect the powers expressly granted." In New York there is a statutory declaration of this common law principle. 1 Rev. Sts. 599, secs. 1-3. "Until the case of *Hodges v. Buffalo*, 2 Denio, 110, nothing," says *Pratt*, J., 3 Comst. 433, "was more frequent than for city authorities to vote largesses and give splendid banquets for objects and purposes having no possible connection with the growth or weal of the body politic, thus subjecting their constituents to unnecessary and oppressive taxation." *Ante*, sec. 55; *post*, chap. XXII. sec. 732.

¹ *White v. Tallman*, 2 Dutch. (N. J.) 67, 1856; *Willis v. Legris*, 45 Ill. 289; *Ib.* 218; *Rounds v. Stetson*, 45 Maine, 596, 1858; *Gilmore v. Holt*, 4 Pick. 258, 1826; *Rounds v. Mansfield*, 38 Maine, 586, 1854; *Smith v. Gates*, 21 Pick. 55, where the rule in the text was applied, although the sale was made only twenty minutes before the expiration of the time required by law. So actual knowledge, by the owner of the beasts, of the impounding thereof, is not equivalent to the *written notice* required by the statute. *Coffin v. Field*, 7 Cush. 355. Abridgment of the required notice for the shortest period avoids the sale; and so does a sale, at one bidding, of two animals having different owners. *Clark v. Lewis*, 35 Ill. 417, 1864. Purchaser must show a regular and authorized sale when his title is questioned by the former owner. *Ib.* Breach of a pound, and liberating an animal therein confined, is no violation of an ordinance prohibiting "any person from opposing or interrupting any city officer in the execution of the ordinances of the city." *Mayor, &c. v. Omburg*, 22 Geo. 67, 1857. Marshal must strictly comply with the ordinance, or he becomes a trespasser from

A statute directing the mayor to issue a warrant annually within ten days from July 1st, commanding police officers to kill all dogs not licensed according to law, whenever and wherever found," is not in conflict with the constitution of Massachusetts.¹

Party Walls.

§ 102. Power in a charter to pass ordinances "to authorize the erection of party walls and fences, and to regulate them," includes the power to authorize their erection upon the application of either owner, and without the consent of the other; and such an ordinance is not uncon-

the beginning: 13 Pick. 384; 4 *Ib.* 258; 21 *Ib.* 55; 13 Met. 407; 7 Cush. 355; 9 Pick. 14; 12 Met. 118; 23 Pick. 255; 12 Met. 198. Owner cannot legally break pound and rescue animals: 5 Pick. 514; 5 Cush. 267. Pound defined: 2 Cush. 305. Marshal cannot delegate his authority to others to impound for him generally, and in his absence, but may have assistants to act in concert with him: Jackson *v.* Morris, 1 Denio, 199. Officers must use the public pound: 1 Rhode Island, 219. Replevin does not lie against a pound-keeper, at common law, while the creatures are in his legal custody. Co. Litt. 47 B.; *Ib.* 145 B.; 1 Chit. Pl. 159; Pritchard *v.* Stevens, 6 Durn. & E. 522; Isley *v.* Stubbs, 5 Mass. 283; Smith *v.* Huntington, 3 N. H. 76; but it does lie if he voluntarily parts with his legal control over them, or if he impounds them in any other places than those prescribed by the law, as, for example, in his pasture or barn, although this be done the more conveniently to furnish them with food and drink: Bills *v.* Kinson, 1 Foster (N. H.) 448, 1850. In New Hampshire, if creatures are found "doing damage," they may be impounded and appraisers are to ascertain "whether *any* damage was done;" held that the statute contemplated *actual*, and not merely nominal damages, to justify impounding: Osgood *v.* Green, 33 N. H. 318, and cases cited. As to power to take up and forfeit animals at large, see also, chapter on Ordinances, *post*.

¹ Blair *v.* Forehand, 100 Mass. 186. The act of July 3d, 1863, entitled "an act in relation to damages occasioned by dogs," so far as it undertakes to charge the owner with the amount of damage done by his dog, as fixed by the selectmen of the town, without an opportunity to be heard, is unconstitutional; because it is contrary to natural justice and not within the scope of legislative authority conferred by the constitution on the general court, and also because it is in violation of the provision of the bill of rights which secures the right of trial by jury in all controversies concerning property, except in cases where it had not theretofore been used and practiced: East Kingston *v.* Towle, 48 N. H. The legislature have power to make towns liable for damage done within their limits by dogs, and to give towns a right of action to recover the actual damage from the owners of the dogs. *Ib.*

stitutional because compensation is not provided for the land occupied by the wall.¹

Public Defense.

§ 103. During the late rebellion, acts were passed by many of the legislatures of the adhering states, in effect authorizing municipalities to raise money, by loans and taxation, to pay bounties to volunteers, to enable the municipality to fill its quota under the calls of the president for troops, and thereby avoid an anticipated draft. The constitutional principles involved in legislation of this character will be found learnedly discussed in the cases below cited, which fully establish the validity of such legislation.² But, without express authority, a municipality possesses no such power;³ yet, if exercised, it may be validated by subsequent legislative action.⁴

Aid to Railroad Companies.

§ 104. The most noted of extraordinary powers conferred upon municipal and public corporations is the authority to aid in the construction of railways by subscribing to their stock, and taxing the inhabitants or the property within their limits to pay the indebtedness thereby incurred. Legislation of this kind had its origin within a period comparatively recent, and has been more or less resorted to, at times, by almost every state in the Union. As

¹ Hunt v. Ambruster, 17 N. J. Eq. 208, 1865.

² Speer v. School Directors, 50 Pa. St. 150, two judges dissenting. See Hilbish v. Catherman, 64 Pa. St. 154, 1870, where the prior cases in that state are commented on by Agnew, J. State v. Richland Township, 20 Ohio St. 362; Thompson v. Pittson, 59 Maine, 545; Broadhead v. Milwaukee, 19 Wis. 652; Booth v. Woodbury, 32 Conn. 118; Shackford v. Newington, 46 N. H. 415; Lowell v. Oliver, 8 Allen (Mass.) 247; Freeland v. Hastings, 10 Allen, 570; Comer v. Folsom, 13 Minn. 219; Cooley Const. Lim. 219-220; Veazie v. China, 50 Maine, 518.

³ Stetson v. Kempton, 13 Mass. 272; Fiske v. Hazzard, 7 Rh. Ia. 438; Shackford v. Newington, *supra*; *ante*, sec. 13.

⁴ Booth v. Woodbury, 32 Conn. 118; Kunkle v. Franklin, 13 Minn. 127; Comer v. Folsom, 13 Minn. 219; Hilbish v. Catherman, 64 Pa. St. 154, 1870; State v. Richland Township, 20 Ohio St. 362, 1870; *ante*, sec. 46.

it is an author's duty, in a work of this character, to state what the law is, rather than what, in his judgment, it ought to be, he feels constrained to admit that a long and almost unbroken line of judicial decisions in the courts of most of the states has established the principle that, in the absence of special restrictive constitutional provisions, it is competent for the legislature to authorize a municipal or public corporation to aid, in the manner above indicated, the construction of railways running near, or to, or through them. The cases on this subject are referred to in the note; but,

¹ *Goddin v. Crump* (act authorizing the city of Richmond to subscribe stock in a company incorporated to improve the navigation of the James river, and to build a road to the falls of the Kanawha river). 8 Leigh (Va.) 120, 1837. This is the earliest case of the class. *Bridgeport v. Railroad Company*, 15 Conn. 475, 1843; *Society, &c. v. New London*, 29 Conn. 174; *Nichol v. Nashville*, 9 Humph. (Tenn.) 252, 1848; *Powers v. Superior Court*, 23 Geo. 65, 1857; *Talbot v. Dent*, 9 B. Mon. (Ky.) 526, 1849; *Slack v. Railroad Company*, 13 *Ib.* 1, 1852; *Maddox v. Graham*, 2 Met. (Ky.) 56; *Commonwealth v. McWilliams*, 11 Pa. St. 61, 1849; *Sharpless v. Mayor, &c.*, 21 *Ib.* 147; *Ib.* 188; *Commonwealth v. Perkins*, 43 Pa. St. 410; 47 *Ib.* 189; *Cotton v. County Commissioners*, 6 Flor. 610, 1856; *Railroad Company v. Commissioners*, 1 Ohio St. 77, 1852; *Cass v. Dillon*, 2 *Ib.* 607, 1853; *Ohio v. Commissioners, &c.*, 6 *Ib.* 280; 7 *Ib.* 327; 8 *Ib.* 394; 12 *Ib.* 596, 624; 14 *Ib.* 569; *Strickland v. Railroad Company*, 27 Miss. 209; *City v. Alexander*, 23 Mo. 483, 1856; 39 *Ib.* 485; *Leavenworth County v. Miller*, Supreme Court of Kansas, 1871, 7 Kansas, 479. The opinion of *Valentine, J.*, covers the whole ground of controversy. *Kingman, C. J.*, concurred, and *Brewer, J.*, dissented. *Clarke v. Rochester*, 24 Barb. 446, 1857; *Bank of Rome v. Rome*, 18 N. Y. 88, 1858; *Starin v. Genoa*, 28 N. Y. 431, 1861; *People v. Mitchell*, 35 N. Y. 551, 1866; *Police Jury v. Succession of McDonough*, 8 La. An. 341; *Aurora v. West*, 9 Ind. 74, 1857; 22 *Ib.* 88; *Robinson v. Bidwell*, 22 Cal. 379; *Stein v. Mayor, &c.*, 24 Ala. 591, 1854; *Gibbons v. Railroad Company*, 36 Ala. 410; *Prettyman v. Supervisors*, 19 Ill. 406, 1858; S. P. 24 *Ib.* 75, 208; *Butler v. Dunham*, 27 Ill. 474, 1861; *Robertson v. Rockford*, 21 Ill. 451; and see, also, as to authority to precinct to levy tax to maintain a bridge, *Shaw v. Dennis*, 5 Gilm. (Ill.) 405; *San Antonio v. Jones*, 28 Texas, 19; *Copes v. Charleston*, 10 Rich. (S. C.) 136, 1857; *Augusta Bank v. Augusta*, 49 Maine, 507; *Clark v. City, &c.*, 10 Wis. 136; *Ib.* 195, 1859 (compare *Whiting v. Sheboygan Railroad Company, infra*). The Supreme Court of Wisconsin, in an opinion delivered in *Phillips v. Albany*, 28 Wis. 340, 1871, say, the power of the legislature to authorize municipal subscriptions to the stock of railroads is settled by former decisions in this state, as well as in other states, though the majority of this court would be disposed to deny the power, if it were a new question. S. P. *Rogan v. Watertown*, 30 Wis. 259, 1872; *Lawson v. Railway Co.*, 30 Wis. 597. The

notwithstanding the opinion of so many learned and eminent judges, there remain serious doubts as to the soundness

Supreme Court of the United States have decided, that the power may be conferred by the legislature. *Infra*, sec. 105a. *Thompson v. Lee County*, 3 Wall. 327; *Knox County v. Aspinwall*, 21 How. (U. S.) 539, 547, 1858; *Zabriskie v. Railroad Company*, 23 *Ib.* 381; *Amey v. Mayor*, 24 *Ib.* 365, 376; *Gelpcke v. Dubuque*, 1 Wall. 175, 1863; *Mercer County v. Hackett*, *Ib.* 81; *Meyer v. Muscatine*, *Ib.* 384; *Caldwell v. Justices*, 4 Jones (N. C.) Eq. 323; *Taylor v. Newberne*, 2 *Ib.* 141, 1854; *S. P. Hill v. Forsythe Co.*, 67 N. C. 367, 1870. In Iowa the constitutionality of railroad subscriptions by municipalities was first (1853) affirmed in *Dubuque County v. Railroad Company*, 4 G. Greene, 1; afterwards (1862) denied, *State v. Wapello County*, 13 Iowa, 388; denial adhered to down to 1869, *Hanson v. Vernon*, 27 Iowa, 28; but note the virtual, yet not acknowledged, overthrow of the line of decisions denying the power, in *Stewart v. Polk County*, 30 Iowa, 1, 1870. The legislative and judicial history of the subject is fully stated in *King v. Wilson*, 1 Dillon's C. C. R. 555, 1871. By the constitution of Tennessee the legislature has power to authorize counties and incorporated towns to impose taxes for "county and corporation purposes." In *Nichol v. Mayor, &c. of Nashville*, 9 Humph. 252, 1848, it was held, notwithstanding this provision, that the legislature possessed the power to authorize municipal corporations to subscribe for the stock of railway companies whose roads run to or near such corporations, and that this *was a legitimate corporate purpose*. So, in Florida, held to be a "county purpose," within the meaning of the constitution; but *quære?* There is nothing in the constitution of Alabama prohibiting the legislature from authorizing a municipal corporation to levy a tax on the real estate within the corporation to aid in the construction of a railroad, even though the road extends beyond the limits of the corporation, or even of the state. So held, in *Stein v. Mobile*, 24 Ala. 591, 1854. An act authorizing a municipal corporation to borrow money to aid in the construction of a railroad, upon the written assent of two-thirds of the resident tax-payers, or upon the approval of two-thirds of the tax-paying electors, is constitutional and valid; and it is not open to the objection that it submits a legislative question to the town. *Starin v. Genoa*, 23 N. Y. 439, 1861; *Gould v. Sterling*, *Ib.* 439, 456; *Bank of Rome v. Rome*, 18 N. Y. 38. These cases distinguished on this point from *Barto v. Himrod*, 4 Seld. 483. *Ante*, sec. 23.

Since the first edition of this work the Supreme Court of Minnesota has affirmed the validity of compulsory aid to railways, and that it is wholly for the legislature to determine whether the aid shall be by subscribing to the stock and issuing bonds in payment or by a donation of money or bonds to secure their construction, the court in either case regarding the *use* to be a *public use* for which taxation may be authorized. *Davidson v. Ramsey County*, 18 Minn. 482, 1872. And the validity of such legislation has also been affirmed by the Supreme Court of Nebraska; *Crounse and Lake, JJ.* concurring, and *Mason, C. J.*, dissenting. The opinion of *Crounse, J.*, reviews the principal cases. *Hallenbeck v. Hahn*, 2 Neb. 377.

of the principle, viewed simply as one of constitutional law. Regarded in the light of its effects, however, there is little hesitation in affirming that this invention to aid the enterprises of private corporations has proved itself baneful in the last degree.

§ 105. It is not proposed here to enter into a discussion of the constitutional principles involved in such legislation. The arguments in favor of the power are fully presented in the leading case of *Sharpless v. The Mayor*,¹ and against it in *Hanson v. Vernon*,² in *Whiting v. Sheboygan Railway Company*,³ and in *The People v. Township Board of Salem*,⁴

¹ *Sharpless v. Mayor*, 21 Pa. St. 147. See, also, Am. Law Rev. Oct., 1870; *infra*, sec. 105 a.

² *Hanson v. Vernon*, 27 Iowa, 28, 1869.

³ *Whiting v. Sheboygan Railway Co.*, 9 Am. Law Reg. (N. S.) 156, 1870; S. C., 25 Wis., opinion by *Dixon*, C. J.; *Rogan v. Watertown*, 30 Wis. 259, 1872.

⁴ *People v. Township Board of Salem*, 9 Am. Law Reg. (N. S.) 487, and notes, 1870; S. C., 20 Mich. 452. "Bonds like these are of modern invention, and when counties and towns were decoyed into the use of them for the purpose of railroad corporations, they had to obtain enabling statutes before they could prostitute municipal seals to any such purpose. And as soon as the people [of Pennsylvania] began to feel the consequences of applying the fundamental principle of commercial paper to their bonds, they altered their organic law so as to render such bonds and enabling statutes impossibilities in the future." *Per Woodward*, C. J., *County v. Brinton*, 47 Pa. St. 367, 1864. The evil of these subscriptions was the cause of the amendment to the constitution. *Per Read*, J., *Pennsylvania Railroad Co. v. Philadelphia*, *Ib.* 193. The amended constitutional provision in Pennsylvania is as follows: "The legislature shall not authorize any county, city, borough, township, or incorporated district, by virtue of a vote of its citizens, or otherwise, to become a stockholder in any company, association, or corporation, or obtain money for, or loan its credit to, any corporation, association, institution, or party." Sec. 7, art. XI., Amendment to Constitution, 1857. See *Pennsylvania Railroad Co. v. Philadelphia*, 47 Pa. St. 189, for construction of this amendment.

The *Ohio Constitution* (art. VIII. sec. 6) provides that "the General Assembly shall never authorize any county, city, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money or loan its credit to, or in aid of, any such company, corporation, or association;" and this was held not to prohibit the legislature from authorizing a municipal corporation to engage in building a railroad mainly outside of the state on its own

to which, and to the other cases before cited, the reader is referred. The judgments affirming the existence of the power have generally met with strong judicial dissent and

account. *Walker v. Cincinnati*, 21 Ohio St. 14, 1871; S. C., 11 Am. Law Reg. (N. S.) 346, and note of Judge *Redfield*. Considering the evil which this provision of the constitution was aimed at, it seems difficult to avoid the conclusion that this construction thwarts the intention and purpose for which the provision was designed and adopted.

This case illustrates the dangerous nature of the invention of bringing the taxing power to aid in the building of railway lines, and particularly does it subvert all previous notions of the appropriate powers, functions, and duties of municipalities. Here a single city, in the face of the constitution, was authorized to borrow \$10,000,000 and issue its bonds in payment, to be appropriated to the construction of a long railroad line by itself and for itself, lying chiefly in other states, and yet the validity of the act giving the authority was sustained. In May of the present year, 1873, the same constitutional provision was before the Supreme Court of the state, and the act of 1872, mentioned below, was held to be in conflict with it, since the legislature could not do indirectly what it was prohibited from doing directly. The court are said, in a case not yet reported, to have held:

1. Taxation can only be authorized for public purposes. When, therefore, a statute authorizes a county, township, or municipality to levy taxes not above a given per cent. on the taxable property of the locality for the purpose of building so much of a railroad as can be built for that amount, and the part of a railroad so to be built can be of no public utility unless used to accomplish an unconstitutional purpose, such tax is illegal and cannot be enforced.

2. Where public credit or money is furnished by any of the subdivisions of the state named in the constitution, to be used in part in the construction of a work which, under the statute authorizing its construction, must be completed, if completed at all, by other parties out of their own means, who are to own, or have the beneficial control and management of the work when completed, public money or credit thus used can only be regarded as furnished for, or in aid of such parties.

The act of April 23, 1872, to authorize counties, townships, and other municipalities therein named to build railroads, &c. [59 O. L. 84], authorizes the raising of money by taxation, which is equally applicable to the unlawful purpose of aiding railroad companies, and others engaged in building and operating railroads, as it is any lawful purpose, and gives to the officers entrusted with the control and operation of the money thus raised, no means or power of discrimination as to the lawfulness of the work or purpose to which it is to be applied, and this in contravention of sec. 6, art. VIII. of the Constitution, and therefore void.

The *Constitution of Indiana* provides that "No county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription." Art. 10, sec. 10. What is an "incorporated

with much professional disapproval, and experience has demonstrated that the exercise of it has been productive of bad results. Taxes, it is everywhere agreed, can only be imposed for *public* objects, and taxation to aid in building the roads of *private railway companies*, even if the use is a public use, is hardly consistent with a proper respect for the inviolability of private property and individual rights. Fraud usually accompanies the exercise of the power, and extravagant indebtedness is the result; and, sooner or later, the power will be denied either by constitutional provision (as in Pennsylvania, Ohio, and Illinois, it already is) or by legislative enactment. It is too late to expect, in view of the line of decisions referred to, that the courts in the states which have already passed upon the question will retrace their steps, and too much to hope that the courts in other states will have the boldness successfully to stem the strong tide of authority, strengthened, as it will be, by temporary popular feeling and insidious corporate influence.

§ 105*a*. Since the first edition of this work, the Supreme Court of the United States, following repeated intimations of its judges in previous cases, have directly sustained the validity of legislative acts authorizing municipal aid to railways.¹ In view of the prior adjudications of that tribunal in the municipal bond cases, referred to in the chapter on Contracts, and of the almost uniform holding of the State Courts, no other result could have been anticipated. This ends judicial discussion, if it does not terminate doubts. The Supreme Court, in reaching this result, places its judgment upon the ground that highways, turnpikes, canals and railways, although owned by individuals under public grants or by private corporations, are *publici juris*; that they have always been regarded as governmental affairs,

company," and how and when stock may be paid for, see *Lafayette, &c. Railroad Company v. Geiger*, 34 Ind. 185, 1870, where the subject is very elaborately considered by *Buskirk, J. John v. Cin., &c. Railroad Co.*, 35 Ind. 539; *Aspinwall v. Jo Daviess Co.*, 22 How. 364.

¹ *Olcutt v. Supervisors*, Dec. Term, 1872; *Railroad Co. v. Otoe County*, Dec. Term, 1872; S. C., reprinted, 2 Neb. 496; *St. Joseph Township v. Rogers*, Dec. Term, 1872; S. C., 7 Albany Law Journal, 362; *Rogers v. Burlington*, 3 Wall. 654; *Mitchell v. Burlington*, 4 Wall. 270.

and their establishment and maintenance recognized as among the most important duties of the State, in order to facilitate transportation and easy communication among its different parts ; and hence the State may put forth, in favor of such improvements, both its power of eminent domain (as it constantly does) and its power to tax, unless there be some special restriction in the constitution of the particular State. These powers may, in the judgment of the court, be lawfully exerted, because the use is in its nature a public use, and these works are subject to public control and regulation (except so far as this right has been lawfully parted with by valid legislative contract), notwithstanding they may be exclusively owned by private persons or corporations. It must be admitted that compulsory taxation in favor of railways and like public improvements owned by individuals or companies is an exercise of power going quite to the verge of legislative authority. Although it is a doctrine that must now be considered as judicially settled, still it is one which has, as we think, justly encountered a vigorous opposition, both on the ground of expediency and of power, and the exercise of the authority has, as before noticed, been so disastrous as already, in some of the States, to have led to constitutional provisions for the protection of the citizen.

§ 105*b*. But it is obvious, from this statement of the grounds upon which the validity of such legislation rests, that it furnishes no support for the validity of taxation in favor of enterprises and objects which are essentially private. We consider the principle equally sound and salutary, that the mere incidental benefits to the public or the State, or any of its municipalities or divisions, which result from the pursuit by individuals of ordinary branches of business or industry, do not constitute a *public use* in the legal sense, which justifies the exercise either of the power of eminent domain or of taxation. It would have been well, in our judgment, if this doctrine had been extended in its application to railway companies ; but it cannot be abandoned without unsettling the foundations of individual rights, without recognizing legislative omnipotence over private property, or the irresponsible despotism of a local

majority, and unwisely opening the way for frauds and abuses which, in view of the past, cannot be contemplated without deep anxiety.¹

¹ The doctrine of the text finds interesting illustrations in several cases recently determined. One is *Lowell v. Boston*, decided by the Supreme Judicial Court of Massachusetts in 1873. After the great fire in Boston, in 1872, the legislature enacted that the city might issue its bonds to the amount of \$20,000,000, the proceeds of which three commissioners appointed by the Mayor were authorized to loan in a safe and judicious manner "in such sums as they shall determine to the owners of land, the buildings upon which were burned by the fire in said Boston, on the 9th and 10th days of November, 1872, upon the notes or bonds of said owners secured by first mortgages of said land; said mortgages to be conditioned that the rebuilding shall be commenced within one year from the first day of January, 1873, and said commissioners to have full power to apply the proceeds of said bonds in making said loans in such manner, and to make such further provisions, conditions and limitations in reference to said loans, and securing the same, as shall be best calculated, in their judgment, to insure the employment of the same in rebuilding upon said land burned over, and the payment thereof to the said city."

It will be seen that the object of this act, as shown by its provisions, was "to insure the speedy rebuilding on land the buildings upon which were burned" by the great fire; and the question was as to the right of the State to impose any taxes for this object, and this depended upon the further question whether this object was, in a legal sense, a public object.

The court distinctly held, to use the language of the rescript sent down in the case, that taxes can only be laid "for some public service or some object which concerns the public welfare;" that "the preservation of the interests of individuals either in respect of property or business, although it may result incidentally in the advancement of the public welfare is, in its essential character, a private and not a public object." "That the incidental advantages to the public or to the State which result from the promotion of private interests, or the prosperity of private enterprises or business does not justify their aid by taxation. "That as a judicial question the case is not changed by the magnitude of the calamity which has created the emergency." And finally the court say, "The expenditure authorized by this statute being for private and not for public objects, in a legal sense, it exceeds the constitutional power of the legislature, and the city cannot legally issue the bonds for the purposes named in the act.

Another case is *Allen v. Inhabitants of Jay*, decided by the Supreme Judicial Court of Maine, July, 1871, 12 Am. Law Reg. N. S. 481. The legislature authorized the town of Jay to lend \$10,000 to enable the borrowers to build a saw-mill and grist-mill, and to exempt the mills from taxation for ten years. On the ground that the purpose was not a public one, the act was adjudged unconstitutional. See opinions of the judges, 58 Maine, appendix, 590, *et seq.*, given to the House of Representatives.

The other case is the *Commercial National Bank v. City of Iola*, decided

§ 106. The courts concur, with great unanimity, in holding that there is *no implied authority* in municipal corporations to incur debts or borrow money in order to become subscribers to the stock of railway companies, and that such power must be conferred by *express* grant. To become stockholders in private corporations is manifestly foreign to the usual purposes intended to be subserved by the creation of corporate municipalities, and the practice of bestowing powers of this kind is of recent origin, and hence the rule, that in order to exist the authority must be specially conferred, and cannot be deduced from the ordinary municipal grants.¹

by the U. S. Circuit Court for the District of Kansas, June, 1873, to be reported in 2 Dillon C. Ct. Reports. For the same reasons the act of the legislature which authorized the city of Iola to appropriate \$50,000 to aid private persons in the erection and equipment of buildings, at or near the city, to be used for manufacturing purposes, was held unconstitutional, and the bonds void which had been issued to raise the money thus appropriated. The case was distinguished from those relating to railway aid bonds, and also construes the provision of the constitution of the State that "The legislature shall pass no *special act* conferring *corporate powers*." *Ante*, sec. 24a.

Further, as to extent and nature of the taxing power and distinction between public and private use, see, *post*, secs. 586, 587; *Bloodgood v. Railroad Co.*, 18 Wend. 65; *Jenkins v. Andover*, 103 Mass. 94, holding invalid a statute authorizing taxation in favor of a private incorporated academy. Same principle: *Curtis v. Whipple*, 24 Wis. 350; *People v. Salem*, 20 Mich. 452; *Freeland v. Hastings*, 10 Allen, 570; *Tyson v. School Directors*, 51 Pa. St. 9; *Thompson v. Pittson*, 59 Maine, 545, 1871.

¹ *Aurora v. West*, 22 Ind. 88, 508, 1864.; *Starin v. Genoa*, 23 N. Y. 439, 1869; *Gould v. Sterling*, *Ib.* 439, 456; *Atchison v. Butcher*, 3 Kansas, 104, 1865; *Burnes v. Atchison*, 2 *Ib.* 454; *Bank v. Rome*, 18 N. Y. 38; *Bridgeport v. Housatonic Railway Co.*, 15 Conn. 475; *Marsh v. Fulton Co.*, 10 Wall. 676, 1870; *Cook v. Manufacturing Co.* 1 Sneed (Tenn.) 698, 1851; *Nichol v. Nashville*, 9 Humph. (Tenn.) 252; *City and County of St. Louis v. Alexander*, 23 Mo. 483, 1856; *Jones v. Mayor, &c.*, 25 Geo. 610, 1858; *Oevricke v. Pittsburg*, 7 Am. Law Reg. 725; *Duanesburg v. Jenkins*, 40 Barb. 574; *French v. Teschemaker*, 24 Cal. 518, 1864; *People v. Mitchell*, 85 N. Y. 551, 1866; *St. Joseph Township v. Rogers*, U. S. Sup. Ct., Dec. T., 1872; *English v. Chicot County*, 26 Ark. 454, 1871; *Thompson v. Lee County*, 3 Wall. 327. *Commercial Bank v. Iola*, 2 Dillon C. C. R., 1873. "No lawyer doubts that a borough can only subscribe to a railroad when expressly authorized by law." *Black, C. J.*, in *Sharpless's Case*, cited *Pennsylvania Railway Co. v. Philadelphia*, 47 Pa. St. 189. A *railroad* is such a "road" as is embraced in the terms of a charter by which the common council of a city were authorized "to take stock in any chartered

Accordingly, where a city was, by charter, specifically authorized to construct wharves, docks, piers, water works, works for lighting the city, &c., and was also authorized, upon certain formalities, to create a debt, this was considered to mean a debt for some of these specified purposes, and not to empower the corporate authorities to issue bonds to aid in the construction of a railroad.¹ So there is no implied power in a municipal corporation to take stock in a *manufacturing company* located in or near the corporation,² or to aid or engage in other enterprises, essentially private.³

company for making roads to said city." *Railroad Co. v. Evansville*, 15 Ind. 395, 1860; *Aurora v. West*, 9 *Ib.* 74; *post*, chapter on Contracts. The legislature may, before (*Aspinwall v. Daviess County*, 22 How. 364), if not, indeed, after, the subscription is made, but before it is paid for, annul the proceeding and authorize the municipal corporation to withdraw the subscription and release its right to the stock. *People v. Coon*, 25 Cal. 635. Extent of legislative power, *ante*, chap. IV.

¹ *Lafayette v. Cox*, 5 Ind. (Port.) 38, 1854. As to rights of bondholders, however, see *post*, Contracts, and decisions in the National and State Courts, there cited. Power *in general* to the city council of Charleston, by the charter of 1783, to pass; *inter alia*, "every other by-law as shall appear to the city council requisite and necessary for the security, *welfare*, and *convenience* of said city," was held by the Court of Errors to authorize the city to subscribe to the stock of railroad companies within or without the state. *Copes v. Charleston*, 10 Rich. (South Car.) Law, 491, 1857; see *City Council v. Baptist Church*, 4 Strob. Law, 306, 308, for preamble to the charter of Charleston. There can be little doubt that this is pressing the constructive powers of the corporation to an unwarrantable extent.

Construction of special acts or charters held to give power to take stock and issue bonds, *Meyer v. Muscatine*, 1 Wall. 384, 1863; *Curtis v. Butler County*, 24 How. 435; *Gelpcke v. Dubuque*, 1 Wall. 220; *City and County of St. Louis v. Alexander*, 23 Mo. 483; *Railroad Company v. Otoe County*, 1 Dillon C. C. 338, 1871; *Rogers v. Burlington*, 3 Wall. 654 (compare, *Chamberlain v. Burlington*, 19 Iowa, 395); *Fosdick v. Perrysburg*, 14 Ohio St. 472; *Goshorn v. County*, 1 West Va. 308; *Taylor v. Newberne*, 2 Jones (North Car.) Eq. 141; *Caldwell v. Justices*, 4 *Ib.* 323; *Veeder v. Lima*, 19 Wis. 280, 1865. The opinion of *Dixon*, C. J., contains an interesting discussion of the questions presented by that case.

² *Cook v. Manufacturing Co.* 1 Sneed (Tenn.) 698, 1854; *Com. Nat. Bank v. Iola*, 2 Dillon C. C. R., 1878.

³ *Clark v. Des Moines*, 19 Iowa, 199, 1865; *Hanson v. Vernon*, 27 Iowa, 28; *Cooley Const. Lim.* 212. A city corporation cannot subscribe for stock in a *steamship line* without express legislative authority. *Pennsylvania Railroad Company v. Philadelphia*, 47 Pa. St. 189; and since the new

§ 107. Whether *special authority* to a municipality to borrow money to pay for stock subscribed to a railway company will *impliedly repeal, pro tanto*, existing charter limitations upon the rate of taxation, is a question depending upon construction, and in relation to which the courts have differed. But the strong inclination of the National Supreme Court seems to be in favor of that construction which restricts such limitations to the exercise of the power of taxation in the ordinary course of municipal action.¹

§ 108. If the *power* to issue bonds in aid of railway and other like enterprises does not exist, they are void into whosoever hands they may come.² The power, when it has been conferred, to aid or engage in extra-municipal enterprises, being extraordinary in its nature and burdensome to

constitution of Pennsylvania (art. XI. sec. 7, Amendment to Constitution, 1857), the legislature cannot give that power. Where a charter recited its purpose to delegate to the city authorities power to make such ordinances as the "contingencies, or the *local* circumstances," of the corporation might require, and gave "full power and authority to make such assessments on the inhabitants of the city, or those who hold taxable property therein, for the safety, benefit, and advantage of the city, as shall appear to them expedient," the court were of opinion that the city might assess a tax upon the real estate within the corporation for the purpose of constructing a canal "for *manufacturing purposes*, and for the better securing an abundant supply of *water for the city*," and if it could not, yet that it was competent for the legislature, as it did by a subsequent act, to adopt and confirm the action of the city in passing such an ordinance. *Frederick v. Augusta*, 5 Geo. 561, 1848. Aside from the curative act, the correctness of the view taken by the court is by no means clear. *Ante*, p. 92, sec. 46; secs. 105a, 105b.

¹ *Butz v. Muscatine*, 8 Wall. 575, 1869. *Contra*, *Clark v. Davenport*, 14 Iowa, 494; *Learned v. Burlington*, 2 Am. Law Reg. (N. S.) 394, and note; *Leavenworth v. Norton*, 1 Kansas, 432; *Burnes v. Atchison*, 2 Kansas, 254. And see *Commonwealth v. Pittsburg*, 84 Pa. St. 496; *Amey v. Allegheny City*, 24 How. (U. S.) 364, *ante*, sec. 89; *Fosdick v. Perrysburg*, 14 Ohio St. 472; *Cumberland v. Magruder*, 34 Md. 381, 1871; see *Assessors v. Commissioners*, 3 Brews. (Pa.) 333.

² *Marsh v. Fulton County*, *supra*; *Clay v. County*, 4 Bush (Ky.) 154. See further, chapter on Contracts, *post*, where the rights of *bona fide* holder of such instruments are considered at length. *Dunovan v. Green*, 57 Ill. 80; *Lynde v. Winnebago County*, Supreme Court United States, January, 1873. *James v. Milwaukee*, United States Supreme Court, December T., 1872. *Post*, sec. 426. *Police Jury v. Britton*, 15 Wall. 566.

the citizen, must (at least between all persons except *bona fide* holders of the securities) be strictly pursued according to the terms and conditions of the grant conferring it.¹ Thus, under an act authorizing town officers to borrow money upon the credit of the town, and to pay it over to a railroad corporation, to be expended by it "in grading and constructing a railroad," taking in exchange its stock at par, it is not within the power of municipal officers to make a direct exchange of the bonds of the town, even for an equal nominal amount of stock, as this leaves it in the power of the railroad corporation to sell such bonds at a discount.² So, in a case where a county had by the legislative act no authority to issue its bonds to the railroad company unless upon the sanction of a previous vote after *thirty days' notice of the election* to be held for that purpose, the Supreme Court of Illinois held, in a *direct proceeding* against the county to enjoin it from issuing its bonds, that although there was an election at which a majority voted in favor of the subscription, yet the failure to give the thirty days' notice was a fatal defect, and the issue of the bonds was restrained.³ It may be observed in

¹ In Pennsylvania the doctrine has been adopted, that equity will compel the holder to take what he gave and interest where the bonds were issued in violation of statute; but *quære?* See *County v. Brinton*, 47 Pa. St. 867; *Pennsylvania Railroad Company v. Philadelphia*, *Ib.* 193.

² *Starin v. Genoa*, 23 N. Y. 439; *Gould v. Sterling*, *Ib.* 439. In the case last cited, *Selden*, J., p. 460, remarks: "In the present case the only authority given [to the town] by the act is to borrow upon the bonds of the town. No express power to sell the bonds is given, and no such power can, I think, be implied. To borrow money, and give a bond or obligation for it, and to sell a bond or obligation for money, are by no means identical transactions. In the one case the money and the bond would, of course, be equal in amount; in the other they might or might not be equal." Whether such a defence would be available against a *bona fide* holder of the bonds was not determined. See *Woods v. Lawrence County*, 1 Black, 886; *Moran v. Miami County*, 2 Black, 722. That such a defence is not available against a holder for value, see *post*, sec. 421.

³ *Harding v. Rockford, &c. Railroad Co.*, Illinois Supreme Court, May, 1873, 5 Chicago Legal News, 424.

In delivering the opinion of the court, *Thornton*, J., remarks: "Such municipalities were not created with the view to engage in commerce, or to aid in the construction of railways, but for governmental purposes only. When they exercise the functions given by the statutes under consideration,

conclusion, that the Supreme Court of the United States, in the municipal railway aid bond cases referred to in a subsequent chapter,¹ have held the doctrine in favor of the innocent holders for value of such securities, that the municipality may be *estopped*, by recitals in the bonds, by the subsequent levy of taxes to pay interest thereon, and by retaining the stock which was received in exchange for the bonds or purchased with their proceeds, to set up in defence a non-compliance with preliminary conditions.² This is a doctrine, however, which is asserted for the protection of such holders, and has no place in controversies which arise *before* the issue of the bonds, between the tax-payers or municipality on the one hand, and the company on the other. In such cases estoppel has no place, and the sound doctrine is that compliance with all substantial or material conditions is essential.

the powers granted must not only be clearly conferred, but strictly pursued. If the mode prescribed for carrying into effect the right to issue bonds is not complied with in all material matters, then the bonds should not be issued, and thus the tax-payer will be exempt from the imposition of illegal taxes, and a grievous burden upon his property. These principles have been so elaborately discussed and fully settled by this court, that we need only refer to some of the cases: *The People v. Tazewell County*, 22 Ill. 147; *Fulton County v. The Mississippi & Wabash R. R. Co.*, 21 Ill. 278; *Supervisors of Schuyler Co. v. The People*, 15 Ill. 181; *Supervisors of Hancock County v. Clark*, 27 *Ib.* 805; *Marshall County v. Cook*, 38 *Ib.* 44; *Wiley v. The Town of Brimfield* (not reported.)"

If aid has been conditionally voted, the condition must be complied with before the company can demand the aid. *Railroad Co. v. Hartford*, 68 Maine, 23.

¹ *Post*, chapter XIV.

² *Post*, sec. 417, *et seq.*

CHAPTER VII.

DISSOLUTION OF MUNICIPAL CORPORATIONS.

In England.

§ 109. In England, a municipal corporation may be dissolved, 1. By *an act of parliament*, this power being considered a necessary consequence of the omnipotence of that body in all matters of political institution.¹ The *king* may, by his prerogative, *create*, but cannot dissolve or destroy a corporation; may grant privileges, but, when vested, cannot take them away.²

It has there often been declared, that a municipal corporation may also be dissolved, 2. By *the loss of an integral part*, or the loss of all, or of the majority of the members of any integral part, without which it cannot transact its business, unless the parts that remain have the right to act or to restore the corporate succession.³

¹ Co. Litt. 176, note; 2 Kyd, 447; Rex v. Amery, 2 Term R. 515; Glover, 408; Angell & Ames, ch. 22, sec. 767; 2 Kent's Com. 305; County Commissioners v. Cox, 6 Ind. 403; State v. Trustees, &c. 5 Ind. 77; *ante*, sec. 15.

² *Ante*, sec. 15; sec. 16; Rex v. Amery. *supra*; Regents of University v. Williams, 9 Gill and Johns. 365, 409, 1838. In this case, *Buchanan, J.*, in substance, observes: The crown may create, but cannot, at pleasure, dissolve a corporation, or, without its consent, alter or amend its charter. Parliament may do this; but, restrained by public opinion, it has not undertaken to dissolve any private corporation since the time of Henry VIII. so that the power to do so rests wholly in theory. In 1783 a bill was proposed to remodel the East India Company. Lord Thurlow opposed it as subversive of the law and constitution, and, in strong language, declared it to be "an atrocious violation of private property, which cut every Englishman to the bone."

³ Willc. on Corp. 325, chap. VII. This chapter contains an interesting discussion of the question of dissolution, and it would seem that the author, notwithstanding the occasional judgments and the many and broad *dicta* in the books, doubts whether there can be an *actual and total dissolution* of a municipal corporation, either by the loss of an integral part, or by surren

3. By a *surrender of the franchise* of being a corporation to the crown, whose acceptance is necessary ; and to be effectual the surrender must be enrolled in chancery. The power to surrender has been much questioned ; the argument in favor of it being, that since by royal grant and acceptance a corporation may be created, so by surrender and acceptance it may be annulled. It is admitted, however, that a corporation created or confirmed by parliament or statute cannot dissolve itself by a surrender of its charter or franchise.¹

4. By *forfeiture of its charter*, through negligence or abuse of its franchise, judicially ascertained by proceedings in *quo warranto* or *scire facias*. This mode of dissolution proceeds upon the doctrine, well settled as to *private* corporations, both in England and in this country, and, perhaps, settled in that country, also, as respects the old municipal corporations when created by royal charter, that there is a tacit or implied condition annexed to the grant of every act or charter of incorporation, that the grantees shall not

der, or by forfeiture. But see 2 Kyd, ch. 5; Glover, ch. 20; Angell & Ames, sec. 769; and particularly *Rex v. Morris* and *Rex v. Stewart*, 3 East, 213; 4 East, 17. In *Rex v. Passmore*, 2 Term R. 241, where the subject was much considered, Lord Kenyon observed, when an integral part of a corporation is gone, without whose existence the functions of the corporation cannot be exercised, and the corporation has no manner of supplying the integral part, the corporation is dissolved as to *certain purposes*. But the king may renovate either with the old or new corporators.

The leading authorities respecting the effect of the *loss of an integral part* are, 1 Rol. Abr. 514; *Regina v. Bewdley*, 1 P. Wms. 207; *Banbury's Case*, 10 Mod. 346; *Rex v. Tregony*, 8 Mod. 129; *Colchester v. Seaber*, 3 Burr. 1870; S. C., 1 Wm. Bl. 591, which, however, is said not to be a case of the loss of an integral part, but of magistrates; *Grant Corp.* 305, note; *Rex v. Passmore*, 3 Term R. 241. The foregoing cases are succinctly stated by Mr. Kyd, 2 Corp. ch. 5. See, also, *Mayor, &c. of Colchester v. Brooke*, 2 Queen's B. 383, and Mr. Justice *Campbell's* learned opinion in *Bacon v. Robertson*, 18 How. (U. S.) 480, 1855; *infra*, sec. 113, note; *People v. Wren*, 4 Scam. 275, citing and relying on *Colchester v. Seaber*, *supra*; *Smith's Case*, 4 Mod. 53; *Smith v. Smith*, 3 Dessaus. (S. C.) 557; *Welch v. Ste. Genevieve*, 1 Dillon C. C. 130; chapters on Corporate Officers and Corporate Meetings, *post*.

¹ *Rex v. Osbourne*, 4 East, 326; *Rex v. Miller*, 6 T. R. 277; Willc. 332, pl. 861; *Howard's Case*, Hutt. 87; *Grant on Corp.* 306, 308; *Thicknesse v. Canal Co.*, 4 M. & W. 472.

neglect to use, or misapply the powers granted, and that if they do, the condition is broken upon which the corporation was created, and the corporation thereupon ceases to exist. And in the cases in the time of Charles II. it was held, that the corporation might forfeit its franchise by reason of the neglect or misconduct of its *officers*.¹

In the United States.

§ 110. These various modes of dissolution, except the first, are believed by the author to be inapplicable to municipal corporations in this country as they are generally created and constituted. Here it is the *people* of the locality who are erected into a corporation, not for private, but for public purposes. The corporation is mainly and primarily an instrument of government. The officers do not constitute the corporation, or an integral part of it. The existence of the corporation does not depend upon the existence of officers. The qualified voters or electors have, indeed, the right to select officers, but they are the mere agents or servants of the corporation, and hence the doctrine of a dissolution by the loss of an integral part has, in such cases, no place. If all the people of the defined locality should wholly remove from or desert it, the corporation would, from necessity, be suspended or dormant, or, perhaps, en-

¹ 1 Blacks. Com. 485; 2 Kyd, 447; Willc. chap. VII. 325, *et. seq.*; Taylors of Ipswich, 1 Rol. 5; Rex v. Grosvenor, 7 Mod. 199; Smith's Case, 4 Mod. 55, 58; S. C., 12 Mod. 17; Skin. 311; 1 Show. 278; Rex v. Saunders, 3 East, 119; Mayor, &c. of Lyme v. Henley, 2 Cl. & F. 331; Rex v. Kent, 18 East, 220; Priestley v. Foulds, 2 Scott N. R. 305, 225; Attorney General v. Shrewsbury, 6 Beav. 220. The American cases relating to the dissolution of *private* corporations by forfeiture of their charters; what will constitute sufficient ground of forfeiture; and the mode of proceeding to ascertain and enforce the forfeiture, are collected, and the result very clearly and satisfactorily stated, in Angell & Ames on Corporations, chap. XXII. See, also, 2 Kent Com. 305. Private corporations may lose their legal existence, 1. By the act of the legislature; 2. By the death of all their members; 3. By a forfeiture of their franchises; and 4. By a surrender of their charter. No other mode of dissolution is anywhere alluded to. Boston Glass Manuf. v. Langdon, 24 Pick. 49, 52, *per* Morton, J.; Commonwealth v. Union Ins. Co., 5 Mass. 230, 232; Riddle v. Locks and Canals, 7 Mass. 169; School v. Canal, &c. Co., 9 Ohio, 203; Canal Co. v. Railroad Co. 4 Gill & Johns. 1; Vincennes University v. Indiana, 14 How. 268.

tirely cease; but the mere neglect or mere failure to elect officers will not *dissolve* the corporation, certainly not while the right or capacity to elect remains.¹ In this respect municipal corporations resemble ordinary private corporations, which exist *per se*, and consist of the stockholders who compose the company. The officers are their agents, or servants, but do not constitute an integral part of their corporation, the failure to elect whom may suspend the functions, but will not dissolve the corporation.²

§ 111. Since all of our charters of incorporation come

Mr. Grant, in his work on Corporations, considers it doubtful whether an *information* in the nature of *quo warranto* will lie, in England, against parliamentary or statute corporations, for usurping powers not given, or misusing those conferred (Corp. 307, 308; Rex v. Nicholson, 1 Str. 29); but in this country, the law as to private corporations is indisputably settled, that in such cases an *information* may be brought.

¹ Wille. chap. VII. and observations at pp. 325, 326, 327, pl. 852; Colchester v. Seaber, 3 Burr. 1866; Colchester v. Brooke, 7 Queen's B. 383; Rex v. Passmore, 3 Term R. 241; Grant on Corp. 308; Bacon v. Robertson, 18 How. 480; Lowber v. Mayor, &c. of New York, 5 Abb. 325; Clarke v. Rochester, 1b. 107; Welch v. Ste. Genevieve, 1 Dillon C. C. 130, 1871. That the *failure to elect officers does not dissolve*, while the capacity to elect remains, see, also, Philips v. Wickam, 1 Paige Ch. 59; Commonwealth v. Cullen, 1 Harris (Pa.) 133; President v. Thompson, 20 Ill. 197; Rose v. Turnpike Co., 3 Watts (Pa.) 46; People v. Wren, 4 Scam. (Ill.) 275; Brown v. Insurance Co., 3 La. An. 177; Welch v. Ste. Genevieve, *supra*; Green Township, 9 Watts & S. (Pa.) 28; Vincennes University v. Indiana, 14 How. 268; Muscatine Turnverein v. Funck, 12 Iowa, 469. In Lea v. Hernandez, 10 Texas, 137, 1853, it appeared that a place was incorporated as a town prior to 1848, that in the year just named the legislature passed an act to incorporate the town, and that no election for officers nor any organization was had thereunder for three years and down to the commencement of the action, nor were there any officers *de facto* acting. The court held that the failure to elect officers operated to dissolve the corporation, there being no express provision of the charter to the contrary. But no authorities are cited and no reasons given, and the conclusion that an actual dissolution of the corporation resulted from a failure to elect, is believed to be unsound.

The existence of a municipal corporation is not considered to be interrupted in consequence of a change in the council. Elmendorf v. Ewen, N. Y. Leg. Obs. 85; Elmendorf v. Mayor, &c. of New York, 25 Wend. 693. Further, see chapters relating to Corporate Officers and Corporate Meetings, *post*.

² Angell & Ames on Corp. sec. 771, and cases there cited; People v. Fairbury, 51 Ill. 149, 1869.

from the legislature,' there can be no dissolution of a municipal corporation by a *surrender* of its franchise. The state creates such corporations for *public* ends, and they will and must continue until the legislature annuls or destroys them, or authorizes it to be done. If there could be such a thing as a surrender, it would, from necessity, have to be made to the legislature, and its acceptance would have to be manifested by appropriate legislative action.

§ 112. The doctrine of a *forfeiture* of the right to be a corporation has also, it is believed by the author, no just or proper application to our *municipal* corporations.' If they neglect to use powers in which the public or individuals have an interest, and the exercise of such powers be not discretionary, the courts will interfere and compel them to do their duty.' On the other hand, acts done beyond the powers granted are void.' If private rights are threatened or invaded, the courts will, as hereafter shown, restrain or redress the injury.' With what surprise would we hear of a proceeding to forfeit the charter of the city of New York or Chicago because of the misconduct of its officers, or because the common council, as in the famous case against the city of London, were assuming to exercise unauthorized powers by ordaning an oppressive by-law. In short, unless otherwise specially provided by the legislature, the nature and constitution of our municipal corporations, as well as the purposes they are designed to subserve, are such that they can, in the author's judgment, only be dissolved by the consent of the legislature. They may become inert, or dormant, or their functions may be suspended, for want of officers or of inhabitants, but *dissolved*, when created by an act of the legislature, and once in existence, they cannot be, by reason of any default, or abuse of the powers conferred, either on the part of the officers or inhabitants of the in-

¹ *Ante*, sec. 17; sec. 22; sec. 30.

² See *Welch v. Ste. Genevieve*, 1 Dillon C. C. 130, 1871, *arguendo*.

³ *Ante*, chap. V. sec. 62; *post*, chapter on Mandamus.

⁴ *Ante*, sec. 55, and notes.

⁵ See chapter on Remedies to Prevent, Correct, and Redress Illegal Corporate Acts, *post*, secs. 727-748.

corporated place. As they can exist only by legislative sanction, so they cannot be dissolved or cease to exist except by legislative consent, or pursuant to legislative provision.

Effect of Dissolution.

§ 113. At common law, a corporation, of whatever kind, which was wholly dissolved, was considered to be civilly dead; and the *effect* was, that their lands reverted to the grantor or his heirs, and the debts of the corporation, whether owing to or by it, were extinguished. Leases made by the corporation would cease because of the reversion of the lands to the original owners; and, for the same reason, lands given to, or held by, the corporation for charitable purposes would be lost.¹ These inconveniences and results are so disastrous that the English courts, as the more recent cases before cited will show, have doubted and limited, although they may not have overthrown the doctrine that municipal corporations may be *totally* dissolved. These consequences of a dissolution of a corporation attached to *all* corporations, eleemosynary, municipal, and private; and since this doctrine has, in this country, been generally rejected as to private corporations organized for pecuniary profit, and rests upon no foundation in reason or justice, it may, perhaps, be safely affirmed that it would not, on full consideration, be applied to the dissolution of a municipal corporation, by an absolute and unconditional repeal of its charter, or (if that may be done) to the case where the charter of such a corporation is forfeited by judicial sentence. Therefore, the leases of a corporation would not be disturbed by its dissolution, nor would their lands held in fee revert, nor would those held in trust for charitable purposes be lost, since equity would supply trustees.²

¹ Co. Litt. 13; 1 Lev. 287; Knight v. Wells, 1 Lut. 519; Rex v. Sanders, 3 East, 119; Attorney General v. Gower, 9 Mod. 226; 1 Rol. Abr. 816; Colchester v. Seaber, 3 Burr. 1866; Willc. 330, pl. 858; 2 Kyd, 516; Rex v. Passmore, 3 Term R. 247; Grant Corp. 305; Colchester v. Brooke, 7 Queen's B. 383; Commonwealth v. Roxbury, 9 Gray, 510, note.

² *Ante* sec. 37; sec. 47; chapters on Corporate Boundaries and Property, *post*. Bacon v. Robertson, 18 How. (U. S.) 480, 1855; Girard v. Philadelphia, 7 Wall. 1, 1868; Mumma v. Potomac Company, 8 Pet. 281,

§ 114. As respects the *creditors* of a municipal corporation, their rights are protected from the legislative invasion by the Constitution of the United States, and no repeal of a

1834; *Curran v. Arkansas*, 15 How. (U. S.) 312; 2 Kent, 307, note; *Angell & Ames Corp.* 779 *a*; *Coulter v. Robertson*, 24 Miss. 278; *County Commissioners v. Cox*, 6 Ind. 403; *State v. Trustees, &c.*, 5 Ind. 77; *Vincennes University v. Indiana*, 14 How. 268; *Owen v. Smith*, 31 Barb. 641; *Commonwealth v. Roxbury*, 9 Gray, 510, note.

The general subject of the *effect of a dissolution of a corporation* is extensively discussed by Mr. Justice Campbell, in *Bacon v. Robertson*, *supra*. The case was a bill in chancery by the stockholders of a bank, whose charter had been judicially forfeited, for a distribution of the surplus after the payment of the debts, and the relief was granted. The Supreme Court of the United States seemed to be of opinion that, upon the *general principles of equity jurisprudence, and without statutory aid*, the surplus of the assets of a corporation for pecuniary profit, after the payment of debts and expenses, belonged to the shareholders; that the creditor of such a corporation, dissolved or declared forfeited by judgment upon *quo warranto* or judicial sentence, has, without a statute to that effect, a claim in equity upon the corporate property for the satisfaction of his debt; that lands conveyed to the corporation in fee and for a full price do not revert, and that the stockholder, as to the surplus after paying the debts, stands upon grounds as high and has claims as irresistible as the creditor before had. The usual consequences of a dissolution, as stated by the text writers, if correct, which was doubted, were deemed inapplicable to moneyed or trading corporations.

In the course of his admirable opinion, the learned justice named observed: "The common law of Great Britain was deficient in supplying the instrumentalities for a speedy and just settlement of the affairs of an insolvent corporation whose charter had been forfeited by judicial sentence. The opinion usually expressed as to the effect of such a sentence was unsatisfactory and questioned. There had been instances in Great Britain of the dissolution of public or ecclesiastical corporations by the exertion of public authority, or as a consequence of the death of their members, and parliament and the courts had affirmed, in these instances, that the endowments they had received from the prince or pious founders would revert in such a case. *Stat. de terris Templariorum*, 17 Edw. II.; *Dean and Canons of Windsor*, Godb. 211; *Johnson v. Norway*, Winch. 37; *Owen*, 73; 6 Vin. Abr. 280. What was to become of their personal estate, and of their debts and credits, had not been settled in any adjudicated case, and, as was said by Pollexfen in the argument of the *quo warranto* against the city of London, was, perhaps, "*non definitur in jure*." [See *ante*, Introductory Chapter, sec. 8.] Solicitor Finch, who argued for the crown in that cause, admitted: "I do not find any judgment in a *quo warranto* of a corporation being forfeited." Treby, on behalf of the city, said: "The dissolving a corporation by a judgment in law, as is here sought, I believe is a thing that never

charter of a municipal corporation can so dissolve it as to impair the obligation of the contract, or, it may probably be safely added, preclude the creditor from recovering his debt.¹

came within the compass of any man's imagination till now; no, not so much as the putting of a case. For in all my search (and upon this occasion I have bestowed a great deal of time in searching) I cannot find that it even so much as entered into the conception of any man before; and I am the more confirmed in it because so learned a gentleman as Mr. Solicitor has not cited any one such case wherein it has been (I do not say adjudged, but) even so much as questioned or attempted; and, therefore, I may very boldly call this a case *primæ impressionis*." The argument of Pollexfen was equally positive.

The power of courts to adjudge a forfeiture so as to dissolve a corporation was affirmed in that case, but the effect of that judgment was not illustrated by any execution, and the courts were relieved from their embarrassment by an act of parliament annulling it. *Smith's Case*, 4 Mod. 53; *Skin.* 310; 8 St. Trials, 1042, 1052, 1283. Nor have the discussions since the revolution extended our knowledge upon this intricate subject. The case of *Rex v. Amery*, 2 Term R. 515, has exerted much influence upon text writers. The questions were, whether a judgment of seizure *quosque* upon a default was final, and, if so, whether the king's grant of pardon and restitution would overreach and defeat a charter granting to a new body of men the same liberties, intermediate the seizure and the pardon. The king's bench, relying upon the Year-Book, discovered that it did not support the conclusion drawn from it, and Chief Baron Eyre says that "Lord Coke had adopted the doctrine too hastily." The discussions upon this case show how much the knowledge of the writ of *quo warranto*, as it had been used and applied under the Plantagenets and Tudors, had gone from the memories of courts and lawyers. 4 Term R. 122; *Tan. on Quo War.* 24. In *Colchester v. Scaber*, 3 Burr. 1866, where the suit was upon a bond, and the defence was, that certain facts had occurred to dissolve the corporation, and that the creditor's claim was extinguished on the bond, Lord Mansfield said, "Without an express authority, so strong as not to be gotten over, we ought not to determine so much against reason as that parliament should be obliged to interfere." The question occurs here, Could parliament interfere? And the answer would be, by their authorizing a suit to be brought, notwithstanding the dissolution. These are all cases of municipal corporations where the corporators had no rights in the property of the corporation in severalty."

¹ *Ante*, chap. IV. *passim*; particularly, sec. 41; *Cooley Const. Lim.* 290, 292; *Curran v. Arkansas*, 15 How. (U. S.) 312; *Bacon v. Robertson*, *supra*; 2 Kent, 307, note; *County Commissioners v. Cox*, 6 Ind. 403; *State v. Trustees*, 5 Ind. 77; *Coulter v. Roberson*, 24 Miss. 278; *Gelpcke v. Dubuque*, 1 Wall. 175, 1865; *Von Hoffman v. Quincy*, 4 Wall. 535; *Welch v. Ste. Genevieve*, 1 Dillon C. C. 130; *Thompson v. Lee County*, 8 Wall. 327;

§ 115. The name of an incorporated place may be changed, its boundaries enlarged or diminished, and its mode of government altered, and yet the corporation not be dissolved, but in law remain the same.¹

§ 116. Where the functions of an old corporation are superseded, or where the corporation, by loss of all its members, or of an integral part, is dissolved as to certain purposes, it may be *revived* by a new charter, and the rights of the old corporation be granted over to the same, or a new set of corporators, who, in such case, take all the rights, and are subject to all the liabilities, of the old corporation, of which it is but a continuation.²

Havemeyer v. Iowa County, 8 Wall. 294; Butz v. Muscatine, 8 Wall. 575; Lansing v. Treasurer, &c., 1 Dillon C. C. 522; Soutter v. Madison, 15 Wis. 30; Smith v. Appleton, 19 Wis. 468; Blake v. Railroad Co., 39 N. H. 435. The dissolution of a *private corporation* by authorized legislative act, or judicial sentence, does not impair the obligation of a contract any more than the death of a private person impairs the obligation of his contract. This doctrine was based upon two grounds: First, the obligation survives, and the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hand of *bona fide* purchasers; second, every creditor is presumed to contract with reference to a possibility of a dissolution of the corporate body. Mumma v. Potomac Company (holding that on *sci. fa.* a judgment could not be revived, or costs adjudged, against a corporation legislatively annulled), 8 Pet. (U. S.) 281, 1834. In the case of the town of Port Gibson v. Moore, 13 Sm. & Marsh. 157, 1849, it was held, indeed, that the repeal of the charter of an indebted municipal corporation dissolved it; that *such dissolution extinguished* debts to and from the corporation, and that a subsequent act re-incorporating the place did not make it liable for a debt existing anterior to the act repealing its charter. The court overlooked the constitutional provision protecting contracts, and the case as to the effect of a dissolution upon the rights of creditors seems to conflict with those above cited. See further, as to extinguishment of debts by dissolution of corporation: Mallory v. Mallett, 6 Jones Eq. 345; Hopkins v. Whitesides, 1 Head (Tenn.) 31; Bank v. Lockwood, 2 Harring. (Del.) 8; Robinson v. Lane, 19 Geo. 337; Muscatine Turnverein v. Funck, 18 Iowa, 469; Owen v. Smith, 31 Barb. 641; Welch v. Ste. Genevieve, 1 Dillon C. C. 130; *post*, chap. XIV.

¹ *Ante*, sec. 52, and cases cited; *post*, chap. VIII. and see *ante*, chap. IV., where the extent of the legislative authority over municipal corporations is considered.

² Rex v. Passmore, 3 Term R. 119, 247; Regina v. Bewdley, 1 P. Wms. 207; Colchester v. Brooke, 7 Queen's Bench, 383; Colchester v. Seaber, 3

Burr. 1866; Grant on Corporations, 304 and note; 2 Kyd, 516. Whether a statute or legislative charter will operate to revive or continue an old, or to create a new and distinct corporation, depends upon the intention of the legislature. *Ante*, chap. V.; Bellows v. Bank, &c., 2 Mason C. C. 43, *per* Story, J.; Angell & Ames, sec. 780; Grant on Corporations, 304, 305; Hoffman v. Van Nostrand, 42 Barb. 174; Girard v. Philadelphia, 7 Wall. 1; Olney v. Harvey, 50 Ill. 453, 1869.

CHAPTER VIII.

CORPORATE NAME, BOUNDARIES, AND SEAL.

Corporate Name.

§ 117. Every corporation must have a name. This is essential to distinguish it from other corporations. In England, before the Municipal Corporations Act of 5 and 6 Will. IV. chap. LXXVI. 1835,¹ such corporations obtained their name by having it expressed in their charter (whether royal or parliamentary), or by usage or by implication.² If a particular name be given to a corporation in its charter, the corporation can no more change it at its pleasure than a man can at pleasure change his baptismal name. If no name be given to a corporation by its charter or by statute, it may obtain one by implication. Where a corporation exists by prescription, it may have more than one name, but the names, to be recognized as valid, must be prescriptive, and cannot be acquired by usage within the time of memory. It has been decided, in England, that a corporation may have one name by prescription and another by grant; but it is said that the same corporation cannot, at the same time, have two different names by different grants, for the name in the last grant will take the place of the other.³

§ 118. But the *Municipal Corporations Act*, just mentioned, which changed the corporate constitution of the cities, towns, and boroughs of England and Wales, and re-

¹ *Ante*, sec. 16, and note.

² Glover, 52, 53; Willc. 35; Grant, 50; *ante*, sec. 21. As to usage, see, *ante*, chap. V. sec. 56.

³ Knight v. Wells, 1 Ld. Raym. 80; Physicians v. Salmon, 3 Salk. 102; Com. Dig. Franch. F. 9; *per Holt*, 1 Salk. 191; 1 Str. 614; Smith v. Railroad Company, 30 Ala. 650, 1857. See, also, All Saints Church v. Lovett, 1 Hall (N. Y.) 191; Manufacturing Company v. Davis, 14 Johns. 288; Middlesex, &c. v. Davis, 3 Md. 133; Trustees v. Peaslee, 15 N. H. 317; Society, &c. v. Young, 2 N. H. 310.

duced them to an uniform model, made this provision as the name of the corporation, under the new act: "Said body, or reputed body, corporate shall take and bear the *name* of the mayor, aldermen, and burgesses of such borough, and by that name shall have perpetual succession, and shall be capable, in law, by the council hereinafter mentioned of such borough, to do and suffer all acts which now lawfully they and their successors may do and suffer, by any name or title of incorporation, so far as not altered or annulled by the provisions of this act.'" It is settled by the decisions under this act that the true or proper corporate name for *boroughs* mentioned in it is "mayor, aldermen, and burgesses of the borough of ———," and (under the interpretation clause, sec. 142 of the act), for cities, "mayor, aldermen, and citizens of the city of ———." It may also be here observed that the courts have determined that, though this act changed the name and made new and important alterations in the constitution of the corporations, yet that its effect was not in any case to create a *new corporation*, but to continue the old, with all their rights, privileges, and franchises, except so far as inconsistent with the provisions of the act.* But the name mentioned in the act would doubtless govern, and by that they would have to sue and be sued.

§ 119. *Charters* granted by legislative enactment, in this country, almost invariably *prescribe the name* of the corporate body thus: "The inhabitants of the city or town of ——— are hereby constituted a body politic and corporate, by the name and style of 'city of ———,' or 'town of ———.'" So the general municipal incorporation acts

* 5 and 6 Will. IV. chap. LXXVI. sec. 6; *ante*, sec. 16, and note.

* Attorney General v. Corporation of Worcester, 2 Phillips, 3; Corporation of Rochester v. Lee, 15 Sim. 376; Grant, 342; Rawlinson, 13.

* Corporation of Ludlow v. Tyler, 7 Car. & P. 537; Attorney General v. Wilson, 9 Sim. 30, 48; Attorney General v. Kerr, 2 Beav. 420, 429; Attorney General v. Corporation of Leicester, 9 Beav. 46; Doe, &c. v. Norton, 11 M. & W. 913, 928. Parke, B., there said, "though the name and style of the corporation, and the mode of electing members were changed, the identity of the body itself was not affected." *Ante*, chap. VII. sec. 116.

* *Ante*, sec. 19.

usually contain a provision to the effect that "cities and towns organized or to be organized thereunder, are declared to be bodies politic and corporate, under the name and style of the city of ———, or town of ———, as the case may be," &c. Where such an act authorized any existing town or city to adopt its provisions in place of its special charter, and was silent as to the corporate name after the change was made, it was held that the former name was retained.¹

§ 120. Where a name is given to a municipal corporation by charter or statute, this cannot be changed by the act of the corporation.² But, in this country, general statutes are not unfrequent, authorizing the creation of *quasi* corporations, without making it necessary to designate the name by which a particular district shall be called; in such case it may acquire a *name by reputation*, and sue and be sued by such name.³

§ 121. A misnomer, or variation from the precise name of the corporation, in a *grant* or *obligation* by or to it, is not material, if the identity of the corporation is unmistakable, either from the face of the instrument or from the averments and proof.⁴

¹ Johnson v. Indianapolis, 16 Ind. 227, 1861. Corporate name of the city not judicially noticed. *Ib.* *Ante*, sec. 20.

² Willcock, 34, 37, 38; Regina v. Registrar Joint Stock Company, 10 Q. B. 839. See Episcopal, &c. Society v. Episcopal Church, 1 Pick. 372. Change of name does not necessarily involve a change of identity. Girard v. Philadelphia, 7 Wall. 1. *Ante*, chap. VII. sec. 116.

³ School District v. Blakeslee, 13 Conn. 227, 1839. As to *quasi* corporations, *ante*, sec. 10, and note; *post*, chapter on Actions.

⁴ Inhabitants v. String, 5 Halst. (N. J.) 323, 1829; Kentucky Seminary v. Wallace, 15 B. Mon. 85, 1854; New York Conference v. Clarkson, 4 Halst. Ch. 541, 1851; Angell & Ames, sec. 185; Pendleton v. Bank of Kentucky, 1 Mon. 177; Medway Cotton Manufacturing Company v. Adams, 10 Mass. 360; People v. Love, 19 Cal. 676; African Society v. Varick, 13 Johns. 38; Woolrich v. Forrest, 1 Pa. 115; Bower v. State Bank, 5 Ark. 234; Pierce v. Somerworth, 10 N. H. 369; Pittsburgh v. Craft, 1 Pitts. (Pa.) 158, 1871; Douglas v. Branch Bank, &c., 19 Ala. 659.

"The general rule to be collected from the cases is," says Chancellor Kent, "that a variation from the precise name of the corporation, when the true name is necessarily to be collected from the instrument, or is shown by

§ 122. Where the *intention of the testator* is clear, a *mistake in the name or description* of the object of his bounty will not make the devise void. This general principle is applicable to all corporations, private and public. But the intention must be so clear as to remove all reasonable doubt as to the corporation meant. This rule may be illustrated by a few examples. Thus, a devise to a college by its common name, though not the true corporate name, is good.¹ So, where the devisees were called by their popular name, "*The South Parish in Sutton*," their legal name being, "*The First Parish in Sutton*," the devise was sustained.² So, also, the "*Mayor, Jurats, and Commonalty of the Town of Rye*," that being the corporate name, were held entitled to lands by a devise to "*The Right Worshipful the Mayor, Jurats, and Town Council of the Town of Rye*," although there was no town council in the town, and although the court admitted the proposition of counsel against the will, that if the "*intent appears to give to a part of the corporation, although that intent fails of effect, the whole corporation cannot take.*"³ So, also, a devise to the Mayor, Chamberlain, and Governors, is valid to a corpora-

proper averments, will not invalidate a grant by or to a corporation, or a contract with it, and the modern cases show an increased liberality on this subject." 2 Kent Com. 292; approved, *St. Louis Hospital v. Williams*, Administrator, 19 Mo. 609, 1854. "We adopt the more reasonable rule laid down by Mr. Kyd (Corp. vol. I. pp. 286, 288), that the variance must be materially different, in substance, to injure." *Per Curiam*, *People v. Runkle*, 9 Johns. 147, 157.

"I take the law of the present day to be, that a departure from the strict style of the corporation will not avoid its contracts, if it substantially appear that the particular corporation was intended, and that a latent ambiguity may, under proper averments, be explained by parol evidence, in this as in other cases, to show the intention." *Per Gibson, J.*, in *President, &c. v. Myers*, 6 Serg. & Rawle, 12; *S. P. Milford, &c. Company v. Brush*, 10 Ohio, 111.

When an act of parliament makes a grant to a corporation, it takes effect though the true corporate name be not used, provided the corporation intended be sufficiently identified or described. 1 Kyd, 256; *Chancellor of Oxford's Case*, 10 Co. 44, 57 b.

¹ *Chancellor of Oxford's Case*, 10 Co. 87 b.

² *First Parish in Sutton v. Cole*, 3 Pick. 232, 1825, and cases there cited.

³ *Attorney General v. Mayor of Rye*, 7 Taunton, 546; 2 Eng. Com. Law, 218 1817.

tion whose true name is Mayor, *Citizens*, and *Commonalty*.¹ So, a legacy may be given to a corporation either by its corporate name or by a description which clearly distinguishes and identifies the legatee.²

§ 123. Where the name of the corporation is expressly defined by charter or statute, it is usually provided in terms that by *such* name it may *sue and be sued*. In such case the true corporate name should be used both in suits by and against the corporation. A name in a grant or obligation to or by a corporation may be sufficient to enable the corporation to enjoy or to make it liable, which would not be sufficient in an action by or against it.³ If the name of a corporation is lawfully changed, not the identity of the corporation itself, suit should, in general, unless provision be otherwise made, be in the new name.⁴ If a note, bond, or

¹ Owen, 85 (14 Eliz.). "The devise held good by *Dyer, Weston*, and *Manwood*, for it shall be taken according to the intent of the devisor." See, also, *Connden v. Clerke*, Hobart, 82; *Croydon Hospital v. Farley*, 6 Taunton, 467; 1 English Common Law, 457, 1816, where *Gibbs*, C. J., justly condemns the absurd nicety of many of the decisions from the reign of Edward VI. to the end of James I. on the subject of the names and description of corporate bodies.

² *New York Institute v. How*, 10 N. Y. (6 Seld.) 84, 1854. In this case the plaintiff, whose corporate name was, "The New York Institution for the Blind," was decided to be entitled to a legacy given to the "Trustees of the Institution for the Maintenance and Instruction of the Indigent Blind," there being no other institution in the city of New York for the blind. See, also, *Vansant v. Roberts*, 3 Md. 119; *Preachers' Aid Society*, 45 Maine, 552; *Chapin v. School District, &c.*, 35 N. H. 445; *Minot v. Boston Asylum*, 7 Met. 416. Parol evidence may, in proper cases, be received to identify the corporation intended. *Trustees v. Peaslee*, 15 N. H. 817; *Bodman v. American Tract Society*, 9 Allen, 447.

³ *Cambridge University v. Crofts*, 10 Mod. 208; 1 Kyd, 253; Willc. 87; *Brittain v. Newland*, 2 Dev. & Bat. (North Car.) 863; *Insane Asylum v. Higgins*, 15 Ill. 185; *Berks Co., &c. v. Myers*, 6 Serg. & Rawle (Pa.) 12; *Clark v. Potter Co.*, 1 Barr (Pa.) 163; *Porter v. Blakely*, 1 Root (Conn.) 440; *Kentucky Seminary v. Wallace*, 15 B. Mon. 35; *Romeo v. Chapman*, 2 Mich. 179.

⁴ *Mayor, &c. of Colchester*, 3 Burr. 1866; *Regina v. Ipswich*, 2 Ld. Raym. 1232, 1238; *Angell & Ames*, sec. 644; *Glover*, 63. Mr. Kyd says: "Where a corporation becomes liable to any duty, and then its name is changed, the *writ* brought against it should be in the new name." 1 Corp. 288. On a merger, by statute, of a *town* into a *city* corporation, it was pro-

other promise be made *to* a corporation, by a name differing from the corporate name, the corporation may sue in its true name, and allege that it is the party to whom the promise or obligation was made.¹

Corporate Boundaries.

§ 124. Since the leading object of an American municipal corporation is to invest the inhabitants of a defined locality or place with a corporate existence chiefly for the purposes of local government, it is obvious that the *geographical limits* or boundaries of the corporation *ought to be defined and certain*. These boundaries are usually described in the charter or constituent act, or a method is prescribed therein, by which they may be ascertained and settled. Because residence within the corporation confers rights and imposes duties upon the residents, and the local jurisdiction of the incorporated place is, in most cases, confined to the limits of the corporation, it is necessary that these limits be definitely fixed.² They are established by

vided that all of the books, papers, moneys, and effects of the former should vest in the latter. Held, that a suit on a bond made to a town before the transfer could not, afterwards, be instituted in the name of the town, but should be brought in the corporate name of the city. *Fort Wayne v. Jackson*, 7 Blackf. (Ind.) 36, 1843.

¹ 10 Co. 125 b; 1 Kyd, 287; *African Society v. Varick*, 13 Johns. 38, 1816; *Trustees v. Reneau*, 2 Swan (Tenn.), 94, 1852; *Fort Wayne v. Jackson*, 7 Blackf. (Ind.) 36, 1843. An allegation that the defendants acknowledged themselves to be bound unto the *plaintiffs, by the description, &c.*, is equivalent to such an averment. 13 Johns. 38, *supra*.

² *Cutting v. Stone*, 7 Vt. 471; *Gray v. Sheldon*, 8 *Ib.* 402; *Pierce v. Carpenter*, 10 *Ib.* 480. As to *boundaries* generally, and construction of acts relating thereto, see *Hamilton v. McNeil*, 13 Gratt. (Va.) 389; *Raab v. Maryland*, 7 Md. 483; *Green v. Cheek*, 5 Ind. 105; *People v. Carpenter*, 24 N. Y. 86; *Elmendorf v. Mayor, &c.*, 25 Wend. 693. *Post*, secs. 433, 497.

The following cases relate to questions which have arisen with respect to places *bounded on rivers*. An act extending the bounds of a town over the adjacent navigable waters does not thereby grant to the town the land covered by the water, and consequently confers no right to make rules to regulate the use of such land, although such an act will bring the territory within the limits of the town for the purpose of civil and criminal jurisdiction. *Palmer v. Hicks*, 6 Johns. 133, 1810.

In *New Hampshire*, towns bounded by or on rivers not navigable, or by

legislative authority. The power to incorporate a place necessarily includes the power to fix and change its boundaries.

§ 125. *There cannot be, at the same time, within the same territory, two distinct municipal corporations, exercising the same powers, jurisdictions, and privileges.*¹

lines up and down the river, extend to the *centre of the river*, and this principle is held to apply to the great streams, the Connecticut and the Merrimack. *State v. Canterbury*, 8 Fost. (N. H.) 195, 1854; *State v. Gilmanton*, 14 N. H. 467. See, also, *Cold Springs, &c. v. Tolland*, 9 Cush. 492.

In *Connecticut*, towns bounded on rivers, in some instances, take the land on each side of the river, in which case the whole river is within the jurisdiction of the town. In other instances, where towns are bounded *on rivers*, the jurisdiction thereof is construed, without any express provision to that effect, and in virtue of ancient usage to that effect, to extend to the centre of the stream. Opposite towns have each political and civil jurisdiction to the centre, though the charter limits extend only to the stream, or margin or channel thereof. *Pratt v. State* (assault on officer on the river Connecticut), 5 Conn. 388, 1824; *Hayden v. Noyes* (oyster fishery on the Connecticut river), *Id.* 391, 395. *Hosmer, C. J. (Id. 395)*, remarks: "Every part of the Connecticut river, so far as it relates to jurisdiction, is within some town in the state; or these waters would be a sanctuary for debtors or criminals. Such has been the invariable usage."

The jurisdiction of *Brooklyn*, for police purposes, extends to *low water line*, whether formed naturally or artificially. *Furman Street*, 17 Wend. 649, 661. See *Udall v. Trustees*, 19 Johns. 175, *Id.* 179, as to boundary of *New York city*. By statute, the bounds of *Albany* extend to the middle of the Hudson river. 9 Wend. 602. Eastern boundary line of *St. Louis* was defined by the charter to be the Mississippi river, and it was held to extend to the middle of the stream, and not simply to the bank. *Jones v. Soulard*, 24 How. 41, 1860.

Where the riparian proprietor only owns to high water mark, and all below belongs to the state, a city cannot tax lots covered by water beyond high water mark. *State v. Jersey City*, 1 Dutch. (N. J.) 525; *Id.* 530.

Statute duty as to *bridges* of adjacent towns bounding on a river running between them. *Brookline v. Westminster*, 4 Vt. 224; *Granby v. Thurston*, 23 Conn. 416.

The same construction that is given to grants is given to statutes which prescribe the boundary of incorporated territories. Thus, where a stream not navigable is made the boundary, the centre of the stream is the true line. *Cold Springs, &c. v. Tolland*, 9 Cush. 492, 1852 (action for defective bridge); *Inhabitants of Ipwick*, 13 Pick. 431.

¹ Willc. on Corp. 27; *Patterson v. Society, &c.*, 4 Zabriskie (N. J.) 385, 399, *per Green, C. J.*, 1854; *Rex v. Passmore*, 3 Term R. 243; *Rex v. Amery*, 2 Bro. P. C. 336; *Grant on Corp.* 18. Where the boundary line of a cor

§ 126. Not only may the legislature originally fix the limits of the corporation, but *it may, unless specially restrained in the constitution, subsequently annex*, or authorize the annexation of, contiguous or other territory, and this without the consent, and even against the remonstrance, of the majority of the persons residing in the corporation or on the annexed territory. And it is no constitutional objection to the exercise of this power of compulsory annexation, that the property thus brought within the corporate limits will be subject to taxation to discharge a pre-existing municipal indebtedness, since this is a matter which, in the absence of special constitutional restriction, belongs wholly to the legislature to determine.¹

poration was vague and indefinite, the practical interpretation which had been given to the statute by the citizens of the disputed district in exercising municipal privileges, such as voting, &c. was adopted by the court. *Milne v. Mayor, &c.*, 13 La. 69, 1838. See, also, *Hamilton v. McNeil*, 13 Gratt. (Va.) 389, 1856. *Post*, sec. 353, n. Boundaries may be defined by long use, confirmed by a legislative recognition. *People v. Farnham*, 35 Ill. 562. If a dwelling house is divided by the boundary line between two towns, that portion of the house which the occupant mainly and substantially makes his home (as by sleeping, eating, &c.) fixes his residence, and he cannot elect to reside and be taxed in the other town. *Cheenery v. Waltham*, 9 Cush. 327.

¹ *Blanchard v. Bissell*, 11 Ohio St. 96, 1860, defining *contiguity* and construing statute authorizing county commissioners to annex; following and approving *Powers v. Wood County*, 8 Ohio St. 285, 1858. See, also, *Layton v. New Orleans*, 12 La. An. 515, 1857; *Arnoult v. New Orleans*, 11 *Id.* 54; *Cheany v. Hooser*, 9 B. Mon. 330; *Gorham v. Springfield*, 21 Maine, 59; *Morford v. Unger*, 8 Iowa, 82, 1859; *St. Louis v. Russell*, 9 Mo. 503, 1845; *St. Louis v. Allen*, 13 Mo. 400, 1850; *Smith v. McCarthy*, 56 Pa. St. 359; *Chandler v. Boston*, Supreme Court, Mass., 1873, not yet reported; *Railroad Company v. Spearman*, 12 Iowa, 112; *Wade v. Richmond*, 18 Gratt. (Va.) 583, 1868; *Norris v. Mayor, &c.*, 1 Swan (Tenn.) 164; *Elston v. Crawfordsville*, 20 Ind. 272; *Edmunds v. Gookins*, *Id.* 477; *Girard v. Philadelphia*, 7 Wall. 1, 1868; *Opinion of Justices*, 6 Cush. 580; *Warren v. Charlestown*, 2 Gray, 104. "It would require," says *Swan, J.*, in *Powers v. Wood County*, 8 Ohio St. 285, 290, "a very artificial and unsound mode of reasoning to hold that territory could not be annexed to a town which owed debts, until the owners of such territory were paid a compensation in money for a proportional part of such debts, on the ground that the property annexed was condemned for public use. It is not to be presumed that a municipal corporation has contracted a debt without being correspondingly benefited." *Ante*, chap. IV.

It is held in Pennsylvania that, under the terms of the act of the legis-

§ 127. In connection with the power of the legislature to create corporations and determine their territorial extent, reference may be made to the *division of towns or public corporations* by legislative act or authority. There is no restriction on the general power, unless it be found in the constitution of the state.¹ In case of division, the legislature may, as we have already seen, apportion the burden between the two, and determine the proportion to be borne by each.² In Connecticut, "the legislature," says the Supreme Court, "have immemorially exercised the power of dividing towns at its pleasure, and, upon such division, apportioning

lature authorizing the incorporation of villages, the boundaries cannot be extended so as to include a large body of farm lands; but the district to be incorporated should be restricted by the courts in which the proceeding is had, so as to include no more than the village itself and its proper territory. Borough of Little Meadows, 35 Pa. St. 335, 1860; Devore's Appeal, 56 Pa. St. 163; Blooming Valley, *Id.* 66; and see chapter on Taxation, *post*, secs. 633, 634.

In Indiana, under act of June 18, 1852, lots adjoining a city, which are laid off, platted, and recorded, may be included within the city limits by resolution of the common council. Contiguous territory not thus laid off, &c., can only be annexed by petition to the board of *county* commissioners. Jeffersonville v. Weems, 5 Ind. (Porter) 547, 1854.

Effect of extension of corporate limits on *homestead right*, where different provisions are made for country and town homesteads. Taylor v. Boulware, 17 Texas, 74; Finley v. Dietrick, 12 Iowa, 516.

Ordinances or contracts designed to operate throughout the city at large, extend to and operate within subsequent enlarged municipal limits. St. Louis Gas Co. v. St. Louis, 46 Mo. 121, 1870.

Recording town plats. Bemis v. Becker, 1 Kansas. 226; Mason v. Pitt, 21 Mo. 391; Strong v. Darling, 9 Ohio, 201. *Post*, sec. 491.

As to taxation, for general municipal purposes, of *rural property* within corporate limits, and the restrictions on the right, see chapter on Taxation, *post*, secs. 633, 634.

¹ *Ante*, chap. IV. secs. 60, 86.

² *Ante*, sec. 36 *et seq.*; Londonderry v. Derry, 8 N. H. 320, 1836; Bristol v. New Chester, 3 N. H. 532; Sill v. Corning, 15 N. Y. 297; People v. Draper, *Id.* 532; Smith v. Adrian, 1 Mich. 495; Waring v. Mobile, 24 Ala. 701; Mayor v. State, 15 Md. 376; Love v. Schenck, 12 Ire. Law, 304, 1851; Love v. Ramsour, *Id.* 328, 1855; Olney v. Harvey, 50 Ill. 453; Dunsmore's Appeal, 52 Pa. St. 374; County Court v. County Court, 3 Bush (Ky.) 93. And see, *ante*, chap. IV. for a general view of the extent of the legislative authority over public and municipal corporations and their rights, liabilities, property, and contracts; and chap. VII. as to the dissolution of municipal corporations and its effect upon their creditors and property.

the common property and common burdens in such manner as to it shall seem reasonable and equitable.”” Accordingly, it may impose on one town, upon such division, the entire expense of erecting and maintaining a bridge across a river which is the dividing line between the two towns.”

§ 128. On the *division* of a town or public corporation *possessing corporate property*, into two separate towns or communities, *each*, in the absence of a different provision by the legislature, was considered by the Supreme Court of New York to be *entitled to hold in severalty the public property* which fell within its limits.¹ In Connecticut, it is de-

¹ *Granby v. Thurston*, 23 Conn. 416, 419, *per Waita*, C. J.; *Willimantic Society v. School Society* (division of school societies and funds), 14 Conn. 457; *Hartford Bridge Company v. East Hartford* (ferry franchise), 16 Conn. 149; affirmed, 10 How. (U. S.) 511, 541. Legislature cannot control an educational fund raised by individual bounty and not by taxation. *Plymouth v. Jackson*, 15 Pa. St. 44. See, also, *Montpelier v. East Montpelier*, 27 Vt. 704; 29 *Ib.* 12. *Ante*, secs. 37, 47, 52, 115.

² *Granby v. Thurston*, *supra*. *Ante*, sec. 43.

The tenacity with which the people of New England cling to the popular or *town* form of government has been before noticed (*ante*, secs. 11, 12); and the Constitution of Massachusetts in the second amendment accepted in 1821 contains the provision that the legislature “shall have full power and authority to *erect and constitute* municipal or city governments in any corporate town or towns in this commonwealth, . . . *provided*, that no such government shall be erected or constituted in any town not containing 12,000 inhabitants, nor unless it be with the consent and on the application of a majority of the inhabitants of such town present and voting thereon at a meeting duly warned and holden for that purpose.” On May 16, 1863, the legislature, without any application by a majority of the inhabitants of the *town* of Brookline, which contained a population of about 6,500, annexed it to the city of Boston, the act to take effect if accepted by a majority of voters voting at meetings to be held in October, 1873. In the case of *Chandler v. Boston and Brookline*, now (June, 1873) pending before the Supreme Judicial Court of Massachusetts, the question is presented whether an entire *town* with less than 12,000 inhabitants can be annexed to a city, and also whether a *previous application* of a majority of the inhabitants of the town is not essential to the *erection or constitution* of a city government therein or over the inhabitants thereof. See opinion of Justices, 6 Cush. 580; *Warren v. Charlestown*, 2 Gray, 104, as to general power of the legislature to change the boundaries of towns and cities.

³ *North Hempstead v. Hempstead*, 2 Wend. 109, 1828. “Suppose,” says *Savage*, C. J., delivering the opinion of the court in this case, “the state to

clared to be "well settled that when part of the inhabitants and territory of an older town are erected into a new corporation, the old town retains all of the property, rights, and privileges formerly belonging to it, and is subject to all its former duties and liabilities, at least as it regards property which has no fixed location in the new town, as lands, buildings, &c.;" accordingly, "upon the division of Hartford, no part of the ferry franchise would pass to the new town of East Hartford, except by virtue of a legal provision to that effect." So, in Massachusetts, it has been held that if a new corporation is created out of the territory of an old corporation, or if part of its territory or inhabitants is annexed to another corporation, unless some provision is made in the act respecting the property and existing liabilities of the old corporation, the latter will be entitled to all the property, and be solely answerable for all the liabilities.

§ 129. But upon the division of the old corporation, and the creation of a new corporation out of part of its in-

be divided into two states, without some special agreement, each would own the public property within its limits. So of counties—the public buildings remain the property of the old county; yet public buildings are as much public property as public lands. So as to the plains, meadows, and marshes which are the subject of this suit. A bill filed by a new county for the partition of the goal and court-house, which had been common property, would be the same in principle as the bill in this suit. Would not such a suit be considered preposterous? Suppose a religious corporation, possessed of a church and parsonage; it becomes expedient to erect part into a new corporation; would not the old corporation retain the property, unless an agreement was made as to the partition of it?" 2 Wend. 109, 185. Incorporation of a part of a *town* into a *city*, held not to divest the title of the town to a tract of land owned by it in fee simple, "in trust, for the use of the town, forever." *Milwaukee v. Milwaukee*, 12 Wis. 93.

¹ *Per Church, J.*, in *Hartford Bridge v. East Hartford*, 16 Conn. 149, 171, 1844; affirmed by Supreme Court of the United States, 10 How. (U. S.) 511, 541. Approving *Windham v. Portland*, 8 Mass. 384; *Hampshire v. Franklin*, 16 Mass. 76; *North Hempstead v. Hempstead*, 2 Wend. 109. *Ante*, sec. 9.

² *Windham v. Portland*, 4 Mass. 384, 1808; *Richards v. Daggett*, 4 *Id.* 539; *Hampshire v. Franklin*, 16 Mass. 76, 1819; *Richland County v. Lawrence*, 12 Ill. 1, 1850; *Blackstone v. Taft*, 4 Gray, 250, 1855; *North Yarmouth v. Skillings*, 45 Maine, 133, 142, 1858; *Cobb v. Kingman*, 15 Mass. 197; *Minot v. Curtis*, 7 Mass. 441, 445. Opinion of Supreme Judges, 6 Cush. 575; *Id.* 578.

habitants and territory, or upon the annexation of part to another corporation, the *legislature may provide* for an *equitable appropriation or division* of the property, and impose upon the new corporation, or upon the people and territory thus disannexed, the obligation to pay an equitable proportion of the corporate debts.¹ The charters and con-

¹ Gorham v. Springfield, 21 Maine 61; North Yarmouth v. Skillings, 45 Maine, 133, 1858; Brewster v. Harwich, 4 Mass 278; *Ib.* 315; *Ib.* 384; Harrison v. Bridgton, 16 Mass. 16; *Ib.* 76, 1819; Lakin v. Ames, 10 Cush. 198, 1852. See School District v. Richardson, 23 Pick. 62, 1839, as to the effect in Massachusetts upon the title to property of the abolition of old *school* districts and the formation of new ones; followed by School District v. Tapley, 1 Allen, 49; but a *dictum* therein questioned by Hoar, J. Simmons v. Nahant, 3 Allen, 316, as to necessity of a deed of conveyance for real estate. Tleson v. Newman, 23 Vt. 421; Richards v. Daggett, 4 Mass. 534; Waldron v. Lee, 5 Pick. 323. In Pennsylvania it was held that, on a division of a township, each fraction remains liable for the whole debt due by the old township; if one pays the whole amount, it lays the foundation for contribution. Plunkett Township v. Crawford, 27 Pa. St. 107, 1856. See New London v. Montville, 1 Root (Conn.) 184. As to right to collect taxes on such division, see Barnett Township v. Jefferson County, 9 Watts, 166; Devor v. McClintock, 9 Watts & S. 80.

As to support of *poor* in case of division: North Whitehall v. South Whitehall, 3 Serg. & Rawle, 117; Overseers, &c. v. Overseers, &c., 2 *Ib.* 422; Stillwater v. Green, 4 Halst. (N. J.) 59.

Where there has been an *insufficient legal division* and organization of a new district, this may be afterwards *ratified* and made binding. Sawyer v. Williams, 25 Vt. 311; Pierce v. Carpenter, 10 Vt. 480; Alden v. Rounsville, 7 Met. 219.

The *mode of proceeding*, under the statute of New York, in the division of old and the erection of new towns, the *directory* nature of the statute as to mode of proceeding, and the presumption in favor of the regularity of the proceedings, are clearly set forth in the case of the People v. Carpenter, 24 N. Y. 86.

As illustrating the *directory* nature of such statutes, see Elmendorf v. Mayor, 25 Wend. 693; Striker v. Kelly, 7 Hill (N. Y.) 9. But an agreement in such division, transcending the powers of the officers who make it, is not binding on the town. Overseers v. Same, 18 Johns. 582. Effect of erection of a *new* out of a portion of an old county on the *terms* of officers who respectively *reside* in the new and old portions, see People v. Morrell, 21 Wend. 563, 1839, and authorities cited by Cowen, J., p. 580. County commissioners must, by law, reside in the county, and on the erection of a new county in which their residences is included, they become *residents* of the *new* county and non-residents of the old county, and cannot legally act for it, unless they remove within it; though if they continue to act without such removal their acts are valid, being officers *de facto*. State v. Hartshorn, 17 Ohio, 135; State v. Jacobs, *Ib.* 143.

stituent acts of public and municipal corporations are not, as we have before seen, contracts, and they may be changed at the pleasure of the legislature, subject only to the restraints of special constitutional provisions, if any there be. And it is an ordinary exercise of the legislative dominion over such corporations to provide for their enlargement or division; and, incidental to this, to apportion their property and to direct the manner in which their debts or liabilities shall be met, and by whom. The opinion has been expressed that the partition of the property must be made at *the time* of the division of, or change in, the corporation, since otherwise the old corporation becomes, under the rule just before stated, the sole owner of the property, and hence cannot be deprived of it by a *subsequent* act of the legislature.¹ But, in the absence of special constitutional limitations upon the legislature, this view cannot, perhaps, be maintained, as it is inconsistent with the necessary supremacy of the legislature over all its corporate and unincorporate bodies, divisions and parts, and with several well-considered adjudications.²

Corporate Seal.

§ 130. The charters of municipal corporations usually contain a clause authorizing them to have and use a *common seal*, and to alter the same at pleasure. Without an express grant it is, however, incident to every corporation to adopt and use a corporate seal. The essential importance which the common law anciently attached to seals, and the

¹ *Hampshire v. Franklin*, 16 Mass. 76; *Windham v. Portland*, 4 *Ib.* 390; *Bowdoinham v. Richmond*, 6 Greenl. (Maine) 112, holding that subsequent legislation could not change the apportionment of the debts between an old town and one created from it, since such an apportionment was in the nature of a contract. But see, *ante*, chap. IV. sec. 37, 44.

² *Layton v. New Orleans*, 12 La. An. 515, 1857, cited, *ante*, sec. 86; *Dunsmore's Appeal*, 52 Pa. St. 374. In this last case, one borough was divided into four, and the legislature was held to have the power afterwards to provide for an equitable adjustment of the indebtedness among them all, by commissioners to be appointed by a designated court, and from whose determination no appeal was allowed. As to extent of legislative control over public and municipal corporations and their rights, liabilities, property, and contracts, see, *ante*, chapter IV. and cases there cited; *Cooley Const. Lim.* 193, 231, 232; *post*, chapter on Taxation.

modern relaxation of the rule, are well known. Respecting seals, the same general principles apply to private and to municipal corporations. Thus, a corporation of the latter class would doubtless be bound equally with a private corporation by any seal which has been *authoritatively affixed* to an instrument requiring it, though it be not the seal regularly adopted.¹ On the other hand, it would not be bound by the affixing of either the regular or temporary seal by a person not legally and duly authorized.² So, under the modern doctrine, a corporation can do an act *in pais* by an attorney in fact, and such attorney need not necessarily be appointed under seal.³

§ 131. The *seal* of a private corporation attached to an instrument *does not prove its own authenticity*; but it should be shown by evidence *aliunde* to be really the seal of the corporation.⁴ The same doctrine is, probably, applicable to the seal of a municipal corporation, except where changed by charter or statute, although it seems that it is usual in England to allow deeds and other instruments relating to real estate go to the jury when authenticated by the corporate seals of London, Edinburgh, or Dublin—these being corporations of great antiquity, or recognized by the legislature.⁵ The corporate seal attached to an instrument

¹ Bank, &c. v. Railroad Company, 80 Vt. 159, 1858, *per Redfield*, C. J.; Tenney v. Lumber Company, 43 N. H. 843; Mill Dam Foundry v. Hovey, 21 Pick. 417; Porter v. Railroad Company, 37 Maine, 349; Angell & Ames Corp. sec. 217; Phillips v. Coffee, 17 Ill. 154; Stebbins v. Merritt, 10 Cush. 27; City Council v. Moorehead, 2 Rich. Law, 430; Grant on Corp. 59, and cases, and note author's opinion and his doubt as to the existence of any *common law* right to *change* the common seal. An impression of a corporate seal stamped upon and into the substance of the paper containing the instrument is sufficient, without wafer or wax. Hendee v. Pinkerton, 14 Allen, 381.

² Koehler v. Iron Company, 2 Black, 715, 1862; Bank of Inland v. Evans, 33 Eng. Law and Eq. 28.

³ Curry v. Bank, 8 Porter (Ala.) 361, 1839; Lathrop v. Bank, 8 Dana, 114; Abby v. Billups, 35 Miss. 618.

⁴ Den v. Vreelandt, 2 Halst. (N. J.) 352, 1800; Gilbert Ev. 19; Jackson v. Pratt, 10 Johns. 881; Moises v. Thompson, 9 Term R. 303; City Council v. Moorehead, 3 Rich. (South Car.) Law, 430; Foster v. Shaw, 7 Serg. & Rawle, 163; *Id.* 318; Mann v. Pentz, 2 Sandf. Ch. 257.

⁵ *Per Kinsey*, C. J., Den v. Vreelandt, 2 Halst. (N. J.) 352.

attested by the signatures of the proper officers, is *prima facie* evidence that it was lawfully placed there, and that the instrument is the act of the corporation.¹

§ 132. The modern rule is that corporations may be bound by *contracts not under seal*, and the circumstances under which they will be bound have been stated by *Story*, J., in terms which have been approved by the courts of nearly every State in the Union. “Wherever a corporation is acting within the scope of the legitimate purposes of its institution, all *parol* contracts made by its authorized agents are *express* promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise *implied* promises, for the enforcement of which an action lies.”

¹ *Levering v. Mayor*, 7 Humph. (Tenn.) 553, 1847; *Abbott Corp. Digest*, tit. *Seal*, p. 725, sec. 31, and the many cases there cited; *Benedict v. Denton*, Walk. Ch. 336; *Musser v. Johnson*, 42 Mo. 74.

² *Bank of Columbia v. Patterson*, 7 Cranch (U. S.) 299, 306, 1813; *Bank v. Wister*, 2 Pet. 318; *Davenport v. Insurance Company*, 17 Iowa, 276; *Ring v. Johnson County*, 6 Iowa, 265. See, further, chapters on Contracts and Property, *post*, secs. 383. 750. Corporate seal affixed to the note of the corporation makes it a specialty, having in this respect the same effect as the seal of a natural person. *Clarke v. Farmers' & Co.*, 15 Wend. 256; *Ib.* 265; *Benoist v. Carondelet*, 8 Mo. 250; *Sturtevant v. Alton*, 3 McLean, 393. Lease held void for want of the corporate seal. *Kinzie v. Chicago*, 2 Scam. (Ill.) 188. But otherwise of an authorized agreement by an agent of a corporation to sell lands: *Legrand v. The College*, 5 Munf. (Va.) 324; or authorized assignment of a lease: *Sanford v. Tremlett*, 42 Mo. 384. Corporate seal to conveyance by county commissioners: *Bestor v. Powers*, 2 Gilm. (Ill.) 126.

Further, see Index—*Seal*.

Mr. Broom gives an excellent view of the exceptions to the rule that corporations must contract by deed, as recognized and established by the modern English decisions. *Broom Com. on Com. Law*, 562–569.

CHAPTER IX.

MUNICIPAL ELECTIONS AND OFFICERS.

§ 133. In considering the Creation and Constitution of Municipal Corporations, we have now reached, in its order, the subject of MUNICIPAL ELECTIONS AND OFFICERS. It will be treated under the following heads:—

1. Municipal Popular Elections—secs. 134–138.
2. Special Tribunal to Determine Election Contests for Municipal Offices—secs. 139–144.
3. Power to Create and Appoint Municipal Officers—secs. 145–152.
4. Oath and Official Bond—secs. 153–155.
5. Duration of Official Term—secs. 156–160.
6. Vacancies in Municipal Offices—sec. 161.
7. Refusal to Serve in Office—sec. 162.
8. Resignation of Municipal Officers—secs. 163–167.
9. Compensation of Municipal Officers—secs. 168–173.
10. Liability of the Corporation to the Officer—sec. 174.
11. Liability of the Officer to the Corporation and to Others—sec. 175.
12. Motion and Disfranchisement—secs. 177–194.

Municipal Popular Elections.

§ 134. Elections by the people, with exceptions in a few States, are by folded or secret ballot, and not open or *viva voce*.¹ The qualifications of electors or voters are fixed by the constitution and laws, and cannot be changed by any ordinance or act of the corporation.² Residence for a certain

¹ Cooley Const. Lim. chap. XVII. 598, where the subject of Popular Elections, the Right to Participate therein, the Conditions Necessary to the Exercise of the Right, the Manner of Voting, the Conduct and Sufficiency of Elections are satisfactorily presented; and the rules and doctrines deduced from the cases are, in general, applicable to popular municipal elections.

² Petty v. Tooker, 21 N. Y. 267; Commonwealth v. Woelper, 3 Serg. &

period within the municipality is almost invariably required in express terms, as one of the qualifications of the right to vote at elections therein, and as one of the conditions of eligibility to hold a municipal office. Non-residents of the corporation have, however, been held competent to be elected to office when residence was not expressly required, but the decisions cannot, perhaps, be said to conclude the point,¹ and, if extended to the higher offices, are hardly

Rawle. 29; *People v. Phillips*, 1 Denio, 388; *Rex v. Spencer*, 3 Burr. 1827; *Rex v. Mayor of Weymouth*, 7 Mod. 371; *Newling v. Francis*, 3 Term R. 189; *Rex v. Chitty*, 5 Ad. & E. 609; *Rex v. Bumstead*, 2 B. & Ad. 699.

¹ Municipal officers may be elected from non-residents of the corporation when there is no statute or constitution prohibiting it, particularly when the office to be filled is one requiring professional skill, and not representative or legislative in its character. *State v. Blanchard* (city surveyor), 6 La. An. 515, 1851. The conclusion was reached with hesitation, but the whole court concurred. *Ib.* So in *The State v. Swearingen*, 12 Geo. 23, 1852, it was decided where the charter of the town provided "for the election of city officers by the people of the city qualified to vote," and was silent as to requiring the officers to be residents, that a person might legally be elected and qualified who was not a resident of the place. Residence as a qualification for municipal office: See *Commonwealth v. Jones*, 12 Pa. St. 365. *Residents*, who are: *Cohen v. Wigfall*, 8 Rich. Law, 237; 2 *Ib.* 489; *Goldersleeve v. Alexander*, 2 Speer (South Car.) 298. In England, by the Municipal Corporations Act (sec. 9), inhabitant householders resident within the borough, or within seven miles of the borough, and rated to the relief of the poor, are made burgesses or citizens. Before that act was passed, residence in the freeman or citizen was sometimes required, to render him eligible to office, although non-residents, wherever residing, might, by a similar perversion of the purposes of a municipal corporation, be admitted to freedom or membership, unless expressly restrained by the charter; and if residence was expressly required as a condition of eligibility, it was not necessary that the officer should continue to reside in the place while holding the office. Not only so, but it was held that where residence was necessary as a qualification during office, it was not, by implication, necessary that the person elected should have been a resident at the time of the election. And when inhabitancy was requisite, it meant not merely residence, but keeping a house within the place, and paying scot and lot. *Willcockon Munic. Corp.* 188, pl. 472; *Ib.* 191, pl. 481; *Ib.* 193, 488; *Rex v. Monday, Cowp.* 539; *Rex v. Mallet*, 2 Barnard. 408; *Rex v. Cambridge*, 4 Burr. 2008; *Rex v. Heath*, 1 Barnard. 417. These rules are of a very doubtful application in this country, since here all of the inhabitants are members of the corporation, and non-residents cannot become such. And, in general, it may be said that a person is an inhabitant or resident who has his domicile or home in the place; but it is foreign to the purpose of this

consistent with the fundamental idea of municipal government.

§ 135. The *choice of a disqualified person* is ineffectual. Thus, if the law requires freeholders to be chosen for certain officers, the election of a person not a freeholder is void.¹ But unless the votes for an ineligible person are expressly declared to be *void*, the effect of such a person receiving a majority of the votes cast is, according to the weight of American authority, and the reason of the matter (in view of our mode of election, without previous binding nominations, by secret ballot, leaving each elector to vote for whomsoever he pleases), that a new election must be held, and

work to enter into the difficult questions which have arisen with respect to residency and domicil. *Hinds v. Hinds*, 1 Iowa, 36; *Story Conf. Laws*, sec. 48; *Putnam v. Johnson*, 10 Mass. 488; *Thorndike v. Boston*, 1 Met. 245. Public officers vacate their office by permanent removal from the territorial limits of the corporation. *Barre v. Greenwich*, 1 Pick. 120; *Rumsey v. Campton*, 16 N. H. 567; *Giles v. School District*, 11 Fost. 804. But a *temporary* removal, with an intention to return, will not, of itself, have this effect. *Van Orsdall v. Hazard*, 3 Hill (N. Y.) 243, 1842; *People v. Metropolitan Police Board*, 19 N. Y. 201; *Lyon v. Commonwealth*, 8 Bibb (Ky.) 430; *Rex v. Exeter*, Comb. 197.

"Nice questions," says Mr. Harrison (*Munic. Manual for Upper Canada*, 2d ed. 60, note), arise as to when a party can, or cannot be said to be a *resident* of a municipality. A man cannot, within the meaning of the municipal laws of Canada, be said to be resident in *two* municipalities at the the same time. A man's residence is where his home is situate—where his family live. An occasional absence from his home to attend to business in another municipality does not make his home less his residence. Where A. had a dwelling-house at Bowmanville, where his wife and family lived, but had a saw-mill and store and was postmaster in the township of Cartwright, which occasioned him frequently to visit that place, and who, while there, used to board with one of his men in a house owned by himself,—*Held*, that after voting in Bowmanville, he had no right to vote in Cartwright. *The Queen ex rel. Taylor v. Cæsar*, 11 U. C. Q. B. 461. Mere colourable residence is in no case sufficient. *The King v. Duke of Bedford*, 6 T. R. 560. Each case must, to a great extent, depend on its own circumstances. As to what is sufficient, see *The King v. Sergeant*, 5 T. R. 466; *Bruce v. Bruce*, 2 B. & P. 229; *The King v. Mitchell*, 10 East, 511; *Whithorn v. Thomas*, 7 M. & G. 1; *The Queen ex rel. Forward v. Bartels*, 7 U. C. C. P. 538.

¹ *Spear v. Robinson*, 29 Maine, 531, 1849; *State v. Swearingen*, 12 Geo. 28, 1852; *State v. Gastinel*, 20 La. An. 114, 1868.

not to give the office to the qualified person having the next highest number of votes.¹

§ 136. Where it is discretionary with the municipal authorities whether they will hold an election or not, votes at an *unauthorized election* are simply nullities.¹ Elections fixed by law at a certain time and place may be legally holden, although notice has not been published or given; but if the time be not defined by statute, and is to be fixed by notice, the notice required is imperative.² Time and

¹ State v. Swearingen, 12 Geo. 23; State v. Giles, 1 Chand. (Wis.) 112; State v. Smith, 14 Wis. 497; Saunders v. Haynes, 13 Cal. 145; State v. Gastinel (under charter), 20 La. An. 114; Cooley Const. Lim. 620; Commonwealth *ex rel.* McLaughlin v. Cluley, Sheriff, Pitts. Leg. Jour. February 3, 1868. But in Indiana the view is taken that, whether an election, because of the ineligibility of the candidate receiving the highest number of ballots, is a failure, and must be held over, or whether the highest eligible candidate is elected, depends upon circumstances: 1. If the candidate receiving the highest number of votes is ineligible, but from a cause *unknown* to the voters, and which they were *not bound to know*—as, for example, infancy, want of naturalization, and the like—the result is a failure, and there must be another election. 2. If the voters know, or are bound to know, the ineligibility of a candidate, the election is not a failure, as the eligible candidate receiving the highest number of votes is legally elected. 3. Where the ineligibility of a candidate arises from his holding, or having held, a public office, the people within the jurisdiction of such office are held in law to know—are chargeable with notice of—such ineligibility, and votes given for such a candidate are of no effect, and his highest eligible competitor is elected. Gulick v. New, 14 Ind. 93, 102, 1860, *per Perkins, J.*; commenting on State v. Swearingen (case of non-residency), 12 Geo. 23; Opinion of Judges, 38 Maine, appendix, where a portion of the people voted for a person not in being; State v. Giles, 1 Chand. (Wis.) 112.

In England, candidates are previously nominated and known, and the votes are, or at least until very recently have been, open, and there are cases there which decide or favor the proposition that votes for a disqualified person, given after notice of disqualification, are thrown away, and the other candidate is elected. Grant on Corp. 203–208, and cases cited. But see, as to disqualification and notice: Regina v. Hiorns, 7 Ad. & E. 690; Regina v. Councilors of Derby, 7 Ad. & E. 419; and particularly Regina v. Mayor of Tewkesbury, Law Rep. 3 Q. B. 629, 1868; Regina v. Ledyard, 8 Ad. & E. 535; Rawlinson on Corp. (5th ed.) 64, note, and authorities. “The principle of these decisions,” says the London Law Times, January 25, 1873, “must be materially affected by secret voting.”

² Opinions of Judges, 7 Mass. 525; Same, 15 *Id.* 537; Cooley Const. Lim. 603.

³ Cooley, Const. Lim. 303, and cases cited; People v. Brenham, 3 Cal

place are generally essential, but many of the details as to the conduct of elections are usually regarded as directory.¹ Courts are anxious rather to sustain than to defeat the popular will.²

§ 137. Thus, an inaccurate designation of the name of the office voted for—as, for example, “Police Justice,” instead of “Police Magistrate” (the term used in the statute)—will not render the votes invalid, where the legislative provisions make clear the intention of the voters in thus casting their ballots—to which intention effect should be given.³ But if a specific number of officers only can be chosen—for example, *four*—ballots containing the names of *more* than four persons for the office in question must be rejected. Any other doctrine might result in giving the elector two votes. There are usually two competing tickets,

477, 1851; *People v. Fairbury*, 51 Ill. 149, 1869. *Computation of time of notice.* *Queen v. Justices*, 8 Ad. & E. 173; *Mitchell v. Foster*, 9 Dowl. P. C. 527.

¹ *Dickey v. Hurlburt*, 5 Cal. 343; *People v. Knight* (essentialness of place), 13 Mich. 424; *Gass v. State*, 34 Ind. 425, 1870. Where the legislature provided that the polls of the different wards should be kept open until 10 o'clock P. M. and they were closed at 8 o'clock, the election was set aside. *Pennsylvania District Election*, 2 Par. (Pa.) 526; *Clark's Case*, *Id.* 521. Illegal *adjournment* of election to a *different place* from the one designated in the notice. *Commonwealth v. Commissioners, &c.*, 5 Rawle, 75. Where an election is held on a *day subsequent* to that named in the charter, the acts of officers thus elected are valid, as respects the public and third persons, and cannot be collaterally inquired into. *Coles County v. Allison* 23 Ill. 437, distinguished from *Haynes v. Washington County*, 19 Ill. 66, and approved in *People v. Fairbury*, 51 Ill. 149, 1869. Title of officers elected before the legal incorporation of a place may be validated by the legislature. *State v. Kline*, 28 Ark. 587. *Post*, secs. 194, 214, 716 n.

² *Skerritt's Case*, 2 Par. (Pa.) 516; *Boileau's Case*, 2 Par. 505; *Carpenter's Case*, 2 Par. 537; *New Orleans v. Graihle*, 9 La. An. 573; *Clifton v. Cook*, 7 Ala. 114; *People v. Cook*, 14 Barb. 259; 8 N. Y. 67. The rule as therein stated is regarded by Mr. Justice *Cooley* as “an eminently proper one, and to furnish a very satisfactory test of what is essential, and what not, in election laws.” *Const. Lim.* 618. See, also, as to charter elections and returns, *Ex parte Heath*, 3 Hill (N. Y.) 42, 53; *People v. Stevens*, 5 Hill, 616; *Morgan v. Quackenbush*, 22 Barb. 72. Courts will not *enjoin municipal elections* unless the power and right to do so plainly exist. *Smith v. McCarthy*, 56 Pa. St. 359. *Post*, sec. 245, note.

³ *People v. Matteson*, 17 Ill. 167, 1855.

and if an elector can, in the case supposed, cast a ballot containing *five* names, he may one of *eight*, and thus vote (if he chooses to insert the names) for both tickets.¹

§ 138. Receiving illegal or improper votes will not alone vitiate an election. It must be shown affirmatively, in order to overturn the declared result, that the wrongful action *changed* it. This rule applies to corporation elections as well as others.²

¹ *People v. Loomis*, 8 Wend. 396, 1832; *People v. Seaman*, 5 Denio, 409. Where only *one vacancy* exists, votes given for *two persons jointly* are thrown away. *Rex v. Mayor of Leeds*, 7 Ad. & E. 963; and in this case it was held that a third candidate chosen by a single regular vote was elected; but as to votes being thrown away, see *supra*. Where, by an erroneous construction of the act, an election has been held for but one councillor, instead of two, the candidate second on the poll cannot have a *mandamus* to admit him to the office. *Regina v. Hoyle*, H. T. 1855, cited in Rawl. on Corp. 65, note. His remedy is, by *mandamus*, to have a new election held for councillor, or (if the office be filled) by a *quo warranto*. *Ib.* The voting papers (corresponding in function to the American ballot, except that it is to be signed by the voter and openly voted) must distinguish between different classes of candidates; and hence where an election of four councillors had taken place on the 1st of November, three of whom were to supply ordinary vacancies, and one an extraordinary vacancy, but no distinction had been made between them in the notice of election, in the voting papers, or in publishing the names of the persons elected, the election was irregular and void. *Regina v. Rowley*, 3 Q. B. 143; S. C. in Exchequer Chamber, 6 Q. B. 668. See sec. 47, Municipal Corporations Act, and also 7 Will. IV. and 1 Vict. chap. LXXVIII. sec. 11. *Patterson, J.*, says: "There is no objection to the votes all being given on the same paper, if a proper distinction were made." *Regina v. Rowley*, *supra*; and see *Rex v. Winchester*, 2 Ad. & E. 215. By the Municipal Corporations Act, sec. 32, the voting paper is required to contain "the *Christian* and surnames of the persons for whom the burgess votes, with their respective *places of abode*, such voting paper being previously *signed* with the *name* of the burgess voting and the name of the street in which the property for which he appears to be rated is situate." In construction of this section, it is held that the Christian name of the person voted for need not be written out in full; the contraction ordinarily used is sufficient. *Regina v. Bradley*, 3 E. & E. 634. But it seems that an initial letter only would not be sufficient. *Ib.* Though it would be in the signature of the voter. *Regina v. Avery*, 18 Q. B. 576; *Regina v. Tart*, 1 E. & E. 618. "Places of abode" held to mean places of residence, not of business. *Regina v. Hammond*, 17 Q. B. 772; *Regina v. Deighton*, 5 Q. B. 896; *Dav. & M.* 682.

Ex parte Murphy, 7 Cow. 158, 1827; *People v. Cicotte*, 16 Mich. 283.

Special Tribunal to Decide Election Contests for Municipal Offices.

§ 139. A constitutional provision that the *judicial power* of the state shall be vested in a supreme and inferior courts, does not disable the legislature, in creating municipal corporations, from providing that the *city council shall be the judge* of the election of its mayor, members, and other officers, and from prohibiting the ordinary courts of justice from inquiring into the validity of the determination of the city council.¹

§ 140. Where, by the charter, the council are authorized to provide, by ordinance, a *special tribunal* before which contested municipal elections shall be tried, and to provide the mode of procedure, it may pass such ordinance *after* an election has been held, and authorize it to determine contests arising out of a previous election. After such determination, *quo warranto* will lie against the party who

1868; *First Parish v. Stearnes*, 21 Pick. 148; *Judkins v. Hill*, 50 N. H. 140, 1870; *Johnston v. Charleston*, 1 Bay (S. C.) 441, 1795. In this last case the city council was specially authorized to judge of elections of corporation officers, and the court, respecting a contest before the council, said: "If the bad votes be deducted from the highest candidate, and he still has a majority, his election is good; but if, after such deduction, the next candidate has an equal or greater number of votes than the other, and it is doubtful which candidate had the greatest number of valid votes, the council should send the matter back to the people."

¹ *Mayor, &c. v. Morgan*, 7 Martin, La. (O. S.) 1; 9 *Ib.* (N. S.) 381, 1828; *infra*, sec. 182. In *Wammacks v. Holloway*, 2 Ala. 31, 1841, a shrievalty contest, it was denied that it was within the constitutional power of the legislature to deprive a party claiming a public office of the right to a jury trial by making the summary or extra-judicial method conclusive. And to this effect was the opinion of two of the judges in *The People v. Cicotte*, 16 Mich. 283. Since elections to offices are not in the nature of contracts, there does not seem to be any substantial reason, in view of the plenary authority of the legislature over offices and officers, to doubt its power to provide, prospectively, by a general act, the mode in which contests shall be determined. See *State v. Fitzgerald*, 44 Mo. 425, 1869; *Ewing v. Filley*, 43 Pa. St. 384; *Commonwealth v. Leech*, 44 Pa. St. 332; *Cooley*, Const. Lim. 276; *Ib.* 623, 624, note; *Smith v. New York*, 37 N. Y. 518; *People v. Mahaney*, 13 Mich. 481; *Steele v. Martin*, 6 Kansas, 430, 1870.

was unsuccessful before the local tribunal, if he continue to claim and exercise the office.¹

§ 141. *Common law courts of general and original jurisdiction* have the admitted power to inquire into the regularity of elections, corporate and others, by *quo warranto*, or an information in that nature, and, in certain cases, by *mandamus*. It is not unusual for charters to contain provisions to the effect that the common council or governing body of the municipality "shall be the judge of the qualifications," or "of the qualifications and election of its own members," and of those of the other officers of the corporation. What effect do provisions of this kind have upon the jurisdiction of the superior courts? The answer must depend upon the language in which these provisions are couched, viewed in the light of the general laws of the state on the subjects of contested elections and *quo warranto*. The principle is, that the jurisdiction of the courts remains unless it appears with unequivocal certainty that the legislature intended to take it away. Language like that quoted above will not, ordinarily, have this effect, but will be construed to afford a cumulative or primary tribunal only, not an exclusive one. A provision that no court should take cognizance of election cases by *quo warranto*, &c., would doubtless be sufficient to divest the jurisdiction of the judicial tribunals. And so, perhaps, of a provision that the council should have the *sole*, or the *final*, power of *deciding* elections.²

¹ *State v. Johnson*, 17 Ark. 407, 1856 (mayoralty contest).

² *Ex parte Heath*, 3 Hill (N. Y.) 42, 52, and cases cited by Cowen, J., who is of opinion that no mere negative words, and that nothing less than *express words*, will oust the supervisory jurisdiction of the courts. *Greer v. Shackelford*, Const. Rep. 642; *State v. Fitzgerald*, 44 Mo. 425, 1869; *Commonwealth v. McCloskey*, 2 Rawle, 369 (two judges dissenting); *Ex parte Strahl*, 17 Iowa, 369, 1864; *State v. Funck*, 17 Iowa, 365, 1864; *Bateman v. Megowan*, 1 Met. (Ky.) 533; *Wammacks v. Holloway*, 2 Ala. 31, 1841 (sheriffalty contest); *Hummer v. Hummer*, 3 G. Greene (Iowa), 42; *Macklot v. Davenport*, 17 Iowa, 379; *Gass v. State*, 34 Ind. 424, 1870. *State v. Marlow*, 15 Ohio St. 114; *post*, chapters on *Quo Warranto*, *Mandamus*, and Remedies against Illegal Corporate Acts. Action of board of canvassers not conclusive of the right of the party to an office, though it may deprive him, in the first instance, of a commission or certificate. *Quo warranto*

§ 142. Agreeably to the rule just stated, a clause in the charter of a municipal corporation, that the city council "shall be the judges of the election, returns and qualifications of their own members, and of all other officers of the corporation," was held by the Supreme Court of Delaware not to oust the Superior Court of the state (invested with the usual powers of the King's Bench) of its superintending jurisdiction over corporations, and it was declared, if the council should erroneously decide that a person duly elected by the people to an office was not qualified to hold it, a *mandamus* might issue commanding them to admit him to the office.¹

lies notwithstanding the determination of the board of canvassers, on which full investigation may be had. *State v. Governor*, 1 Dutch. (N. J.) 331, 1856; *State v. The Clerk*, *Ib.* 354; *People v. Kilduff*, 15 Ill. 492; *Cooley Const. Lim.* 623, and cases cited; *Hadley v. Mayor*, 33 N. Y. 603, 1865; *Anthony v. Halderman*, 7 Kansas. 50, 1871.

Conformably to the views expressed in the text it has been recently decided by the Supreme Court of Pennsylvania, that the right given to city councils to be the judges of the qualification of their own members "in like manner as each branch of the legislature" does not preclude the jurisdiction of the courts to try the question of qualification by *quo warranto*, though the opinion of the profession seems to be otherwise, and it was otherwise held in the court below. *Commonwealth v. Huhn*, 1872, not yet reported.

A special remedy given by statute is *cumulative* and not exclusive of the ordinary jurisdiction of the courts, unless such be the manifest intention of the statute. *Attorney-General v. Corporation of Poole*, 4 Mylne & Cr. 17, overruling 2 Keen, 190. See, also, *Attorney-General v. Aspinwall*, 2 Mylne & Cr. 613. And hence a breach of a public trust by a municipal corporation is held, in England, to be cognizable in chancery, notwithstanding a special appeal be given in the particular matter to the lords of the treasury. *Ib.*; *Parr v. Attorney-General*, 8 Cl. & F. 409; *Attorney-General v. Corporation of Litchfield*, 11 Beav. 120. See chapter on Remedies against Illegal Corporate Acts, *post*, sec. 730.

¹ *State v. Wilmington*, 3 Harring. (Del.) 294, 1840; S. P. *State v. Fitzgerald*, 44 Mo. 426, 1869. So, in Iowa, where the city charter provided that the council should be "the judge of the election and qualifications of its own members," but no ordinance had been passed prescribing any method of trial, it was held that the mere provision in the charter did not preclude a contestant from a resort to an information in the nature of a *quo warranto*. *State v. Funck* (mayoralty contest), 17 Iowa, 365, 1864. In a previous case, the same court decided that under a charter making the council "judges of the election, returns and qualifications of their own members," it was competent for the council to pass a general ordinance providing for the trial of

§ 143. Where the *legislative intent* is clear, *that the action of the council* in contested election cases *shall be final*, the court will not inquire into election frauds, since the council is the judge of this matter as of others pertaining to the election; but the courts will inquire whether, in point of law, there was an office or vacancy to be filled.¹

§ 144. Where, by statute, the returns of all municipal elections were declared to be "subject to the inquiry and determination of the Court of Common Pleas upon the complaint of fifteen or more voters filed in said court within twenty days, and the court, in judging of such elections, was directed to proceed upon *the merits* thereof, and *determine finally* concerning the same according to the laws of the commonwealth," this was held to exclude the remedy by *quo warranto* and all common law remedies as to matters which might have been investigated in the special mode prescribed by the statute. The opinion was expressed that the judgment of the Common Pleas was final; that it could not be reversed by *quo warranto* or in any other collateral manner, and that even a *certiorari* would enable the ap-

contested elections of city officers, and making the council the tribunal for the trial of the same, such an ordinance being consistent with the general laws of the state, which, in providing special tribunals for contesting state, county, and township officers, omitted to make any special provision for contested elections to municipal offices. *Ex parte Strahl*, 16 Iowa, 869, 1864 (mayoralty contest).

¹ *Commonwealth v. Leech*, 44 Pa. St. 332, 1863; *Commonwealth v. Meeser*, *Ib.* 341. Construction of words making the number of members of the council from a ward depend upon "the *list* of the taxable inhabitants." *Ib.*; *People v. Wetherell*, 14 Mich. 48; *Tompert v. Lithgow*, 1 Bush (Ky.) 176, 1866.

Pending legal proceedings, the court, in favor of the officer apparently entitled, *enjoined the adverse* claimant from attempting to take possession of the office. *Ewing v. Thompson*, 43 Pa. St. 384, 1862; *Kerr v. Trego*, 47 Pa. St. 16, 292, 1864. Certificate of election is the *prima facie* written title to office, and remains so until regularly set aside or annulled. *Ib.* *Post*, sec. 213.

The council, as board of canvassers, cannot investigate the *legality* of an election, but are concluded by the returns of the judges; but the council, when sitting as a tribunal to judge of the election of members of their body, may go behind the returns and inquire into the fact as to who is elected. *State v. Rahway*, 33 N. J. Law, 111, 1866.

pellate court to examine only the regularity of the proceedings of the Common Pleas, but not to examine the case on its merits as disclosed in the evidence.'

¹ Commonwealth v. Garrigues, 28 Pa. St. 9, 1857; Commonwealth v. Baxter, 35 Pa. St. 263; Commonwealth v. Leech, 44 Pa. St. 332: Followed and approved, State v. Marlow, 15 Ohio St. 114; see Ewing v. Filley, 43 Pa. St. 386; Lamb v. Lynd, 44 Pa. St. 336. *Ellyson, ex parte*, 20 Gratt. (Va.) 10, 29, 1870, commenting on Commonwealth v. Garrigues, *supra*. Function and powers of common council as election canvassers. Morgan v. Quackenbush, 22 Barb. 72. A city council, under authority "to canvass returns and determine and declare the result" of elections to municipal offices, exhausts its power when it has once legally canvassed the returns and declared the result, and it cannot, at a subsequent meeting, make a re-canvass and reverse its prior determination. Hadley v. Mayor, 33 N. Y. 603, 1865. The rule stated in the text, that the original or superintending jurisdiction of the superior courts should not be held to be taken away by any language which does not expressly, or by unequivocal implication, show this to have been the legislative intention, is a salutary one, but seems, in some cases, not to have been very strictly observed. In *Texas*, where the statute conferred upon the County Court the power to determine contested elections of county officers, and gave no right to appeal, it was considered to be the policy of the statute to secure an early determination of such disputes, and it was held that the judgment of the County Court could not be revised either upon appeal or *certiorari*, and was final. O'Docherty v. Archer, 9 Texas, 295, 1852. *Post*, chap. XXII.

The constitution of *Ohio* requires the general assembly "to determine, by law, before what authority, and in what manner, the trial of contested elections shall be conducted," and accordingly a specific mode of contesting elections in that state was provided by statute; and this mode was held to exclude the common law mode by proceedings in *quo warranto*, and the result to bind the state as well as individuals. State v. Marlow, 15 Ohio St. 114, 1864.

In *South Carolina* it was held, where the legislature had authorized managers of elections "to hear and determine" cases of contested elections, without making any provision for an appeal, or any reference in the act to proceedings by *quo warranto* that their decision was, without any express statutory declaration to that effect, final and conclusive, and that courts had no control over it. Grier v. Schackelford, 3 Brev. (South Car.) 491, 1814 (Nott, J., dissenting); followed in the State v. Deliesseline, 1 McCord, (South Car.) 52, 1831 (two judges dissenting). See State v. Huggins, Harper Law, 94, 1824. But note remarks of Evans, J., in State v. Cockrell, 2 Rich. (South Car.) Law, 6, who, speaking of the subsequent act of 1839 (requiring the managers to hear and determine the validity of the election, and providing that their "decisions shall be final"), says: "I take it to be clear that the validity of an election, in all cases, must [under the act], in the first instance, be decided by the court of managers duly authorized accord-

Power to Create and Appoint Municipal Officers.

§ 145. At common law, municipal corporations may appoint officers, but only such as the nature of their constitution requires. The right of electing such officers as they are authorized to have is incidental to every corporation, and need not be conferred by charter. The power of appointing officers is, at common law, to be exercised by the corporation at large, and not by any select body, unless it is so provided in the charter. The powers of corporate officers proper, at common law, are very limited, extending only to the administration of the by-laws and charter regulations of the corporation.¹

§ 146. In this country the charter or constitution of the
ing to law. All questions, whether of law or fact, must be submitted to this tribunal. Their decisions, on questions of fact, must necessarily be final, as no appeal is given; but I do not mean to say that their errors of law may not be corrected by *certiorari*, or such of the prerogative writs as may be best suited to the case." Accordingly, where an election, within the act, had not been contested before the managers, the court refused leave to file an information in the nature of a *quo warranto*. It was afterwards stated, by a distinguished judge in that state, that the scrutiny of municipal elections, as an incidental power, belongs, in the first place to the city council, and if they abuse that power, the correction of that abuse devolves upon the courts by information in the nature of a *quo warranto*. *Per O'Neill, J.*, in *State v. Schmairie*, 5 Rich. Law (South Car.) 299, 301, 1852 (*Quo. War.* to test validity of defendant's election as mayor of Charleston). *S. P. Johnson v. Charleston*, 1 Bay (South Car.) 441, 1795. But the city council, in order to determine a contest for a municipal office, cannot swear the individual voters to compel them to declare for whom they voted. This is an inquisitorial power unknown to the principles of our government, and of dangerous tendency. *Ib.* See, also, *People v. Pease*, 27 N. Y. 81; *People v. Cicotte*, 16 Mich. 288; *Cooley Const. Lim.* 604-606. Election contests for office will not be determined on *habeas corpus*. *Ex parte Strahl*, 16 Iowa, 369; nor, in general, on bill in equity. *Hagner v. Heyberger*, 7 Watts & S. 104; but see *Kerr v. Trego*, 47 Pa. St. 292. *Post*, sec. 213. *Hughes v. Parker*, 20 N. H. 58; *Cochran v. McCleary*, 22 Iowa, 75, 1867, and chapter on Corporate Meetings, *post*. But as to county seat contest, where fraud is alleged, see *Brown v. Smith*, 46 Ill. See, also, chap. XXII. *post*.

¹ *Willc.* 234, pl. 598; *Ib.* 297, pl. 767; *Ib.* 298, pl. 769; *Glover*, 220; *Vintners v. Passey*, 1 Burr. 237; *Hasting's Case*, 1 Mod. 24; *Rex v. Barnard*, Comb. 416.

corporation usually provides with care as to all the *principal officers*, such as mayor, aldermen, marshal, clerk, treasurer, and the like, and prescribes their various duties. This leaves but little necessity or room for the exercise of any implied power to create other offices and appoint other officers.¹ It is supposed, however, when not in contravention of the charter, that municipal corporations may, to a limited extent, have an incidental right to create certain minor offices of a ministerial or executive nature. Thus, if power be conferred to provide for the health of the inhabitants, this would give the corporation the right to pass ordinances to secure this end, and the execution of such ordinances might be committed to a health officer, although no such officer be specifically named in the organic act, if this course would not conflict with any of its provisions. But the power to create offices even of this character would be limited to such as the nature of the duties devolved on the corporation naturally and reasonably required.

The provisions of the charter as to time and mode of election, the appointment, qualifications, and duration of

¹ Where it was manifest, from the whole tenor of a city charter, that it was the intention of the legislature itself to specify therein all the offices, and designate all the officers to be elected or chosen, and to regulate the mode of appointment, it was held that the city council could not, by virtue of an inherent or implied power, *create another officer*, fix his term, provide for his appointment, and clothe him with the powers of a municipal officer. *Hoboken v. Harrison*, 1 Vroom (N. J.) 73, 1862. It is said, in the opinion, that the power to create municipal officers should be *expressly* conferred. In New Jersey, pound-keepers, from a very early period, had been public *township* officers, elected in the same way as other officers of the township. Under these circumstances it was held that a municipal corporation could not, without express authority therefor, establish another public pound within the limits of the township, and prescribe regulations and fees variant from those prescribed by the general law; and it was further held, that the office of pound-keeper could not be considered as one essential to the business of the corporation; nor is a pound-keeper one of those subordinate officers, which all municipal corporations may, as of course, appoint. It was, however, admitted by the court, that where such a corporation has power to do an act, it has the incidental power to appoint persons to carry it into effect. *White v. Tallman*, 2 Dutch. (N. J.) 67, 1856. Authority to a municipal corporation *to appoint an officer* was inferred from the frequent mention of the office and its duties in the charter. *People v. Bedell*, 2 Hill (N. Y.) 196; see, also, *Field v. Girard College*, 54 Pa. St. 233.

the terms of officers, must be strictly observed. Therefore, an ordinance which makes eligible those who, by the charter, are not so,¹ or which abridges the term of officers as fixed by the charter, is unauthorized and void.²

§ 147. Every municipal corporation is provided with an *executive head*, usually styled the *mayor*. In the chapter on Corporate Meetings we have pointed out the difference, in some respects, between the mayor of an old corporation in England and the officer known by that name in this country. In both countries the mayor is the head officer or executive magistrate of the corporation; but with us it is important to bear in mind that all his powers and duties depend entirely upon the provisions of the charter or constituent act of the corporation, and valid by-laws passed in pursuance thereof,—and these vary, of course, in different municipalities. It is usually made his duty, however, to see that municipal ordinances are executed, and to preside at corporate meetings; and he is frequently expressly declared to be a member of the council or local legislative body. Properly and primarily his duties are executive and administrative, and not judicial or legislative. But judicial duties are often superadded to those which properly appertain to the office of mayor, and he is invested with the authority to administer not only the ordinances of the corporation, but also, judicially, to administer the laws of the state.³

¹ *Rex v. Mayor of Weymouth*, 7 Mod. 373; *Rex v. Bumstead*, 2 B. & Ad. 699; *Rex v. Spencer*, 3 Burr. 1827; *Rex v. Chitty*, 5 Ad. & E. 609.

² *Stadler v. Detroit*, 13 Mich. 346, 1865; *Vason v. Augusta*, 38 Geo. 542, 1868. Chapter on Ordinances, *post*. The office of treasurer of a municipal corporation is not a "civil office" within the meaning of the provision of the constitution excluding the clergy from "holding any *civil office* in this state, or from being a member of the legislature." *State v. Wilmington*, 3 Harring. (Del.) 294, 1840; see *Commonwealth v. Dallas*, 8 Yeates (Pa.) 500. "Lucrative offices," in the constitutional sense, defined to embrace county recorder, commissioner, township trustee, and supervisor. *Daily v. State*, 8 Blackf. 329; *Creighton v. Piper*, 14 Ind. 182; *Howard v. Shoemaker*, 35 Ind. 111.

³ *Waldo v. Wallace*, 12 Ind. 569, 1859, and growing out of it, see, also, *Gulick v. New*, 14 *Id.* 93, 1860; *Howard v. Shoemaker*, 35 Ind. 111, 1871; *Keynolds v. Baldwin*, 1 La. An. 162, 1846; *Muscatine v. Steck*, 7 Iowa, 505; 2 *Id.* 229; *Ex parte Strahl*, 16 Iowa, 369; *Shafer v. Mumma*, 17 Md. 331;

§ 148. The *office of mayor* has long existed in England,¹ and many of its general features have been adopted

Slater v. Wood, 9 Bosw. 15. *Ante*, chap. III. Morrison v. McDonald, 21 Maine, 550, 1842; State v. Maynard, 14 Ill. 419; Commonwealth v. Dallas, 8 Yeates (Pa.) 300, 1801; Starr v. Wilmington, 8 Harring. (Del.) 294, 1839; Prell v. McDonald, 7 Kansas, 426, 1871.

Power of mayor, in his official name, to bring *suit* to prevent or restrain violations of law by other municipal officers, declared. Genois, Mayor, &c. v. Lockett, 13 La. 545, 1838. But *quare*? The mayor of a city has no incidental power to execute an *appeal bond* for the corporation; and such a bond was regarded as not even incidental to the power of taking an appeal, but must be authorized by the council. Baltimore v. Railroad Co., 31 Md. 50, 1863. A precept to collect a street assessment, signed by a member of the council acting temporarily as president thereof, is void, when the statute requires the *signature* of the mayor. Jeffersonville v. Patterson, 32 Ind. 140, 1869. Injunction will lie to restrain a sale on such a precept. *Ib.* See chapter on Remedies against Illegal Corporate Acts, *post*.

As to nature and extent of authority of mayors and other civil officers to employ force for the prevention or suppression of *mobs, riots, &c.*: See *Ela v. Smith*, 5 Gray, 121, 1855, arising out of the arrest of Anthony Burns as a fugitive slave. Power of mayor to order demolition of works and buildings in *public places*: Henderson v. Mayor, 3 La. 563. Mayor may sanction an ordinance passed by a common council, whose term has expired: Elmen-dorf v. Ewen, 2 N. Y. Leg. Obs. 85. *Notice to mayor*: Nichols v. Boston, 98 Mass. 39. *Police and executive power of Mayor*: Shafer v. Mumma, 17 Md. 581; Slater v. Wood, 9 Bosw. 15; Pedrick v. Bailey, 12 Gray, 161; Nichols v. Boston, 98 Mass. 39. Alderman acting as mayor: State v. Buffalo, 2 Hill, 434. Judicial power of mayor: See Municipal Courts, *post*. Prell v. McDonald, 7 Kansas, 426; Howard v. Shoemaker, 65 Ind. 111, 1871. Presence and functions of mayor at meetings of the council: See the chapter on Corporate Meetings, *post*.

Liability of Mayor in Upper Canada to private actions in respect to his official acts: Fair v. Moore, 3 Upp. Can. C. P. 484; Moran v. Palmer, 13 Ib. 450, 528. Fraud of Mayor restrained and relieved against: Patterson v. Bowes, 4 Grant, 170; *Ib.* 489. *Post*, sec. 730, note.

¹ *History and nature of office of Mayor*, consult: 4 Jacob's Law Dict. 264, 265; 2 Toml. Law Dict. 540; 2 Bouv. 150. Spelm. Gloss. "Mayor;" *Ela v. Smith*, 5 Gray (Mass.) 521, 1855; Achley's Case, 4 Abb. Pr. Rep. 35, 1856; Cochran v. McCleary, 22 Iowa, 75, 82, 1867; Nichols v. Boston, 98 Mass. 39; Fletcher v. Lowell, 15 Gray, 103. *Ante*, secs. 9, 116; *post*, secs. 191, 198, 209, 265, 358. The office in England is quite ancient. In 1204 King John made the bailiff of King's Lynn a mayor, with administrative powers. The title was a common one as early as the time of Bracton.

Mr. Norton, in his valuable "Commentaries on the History, Constitution, and Chartered Franchises of the City of London," says that the first *specific* grant of the *mayoralty* to the city of London was made by King John in a

in this country. In a former page suggestions have been made in favor of increasing its dignity and responsibility, as a means of insuring more satisfactory municipal rule; but the subject is not sufficiently connected with practical law to warrant more than an allusion to it in a work of this character.¹

§ 149. The office of a *Police Officer* is not known to the common law; it is created by statute, and such an officer has, and can exercise, only such powers as he is authorized to do by the legislature, expressly or derivatively.²

charter dated on the 9th day of May, in the sixteenth year of his reign, A. D. 1267. This charter declares that the king has granted and confirmed to the barons of London the right of choosing a mayor every year, and at the end of the year of removing him and substituting another, if they will, or electing the same again. He is to be presented to the king, and swear to be faithful to him. The use of the word *confirmed*, in this charter, shows that the name and officer existed before. The first civic magistrate had begun to be called by the name of mayor toward the end of the reign of his predecessor, Richard. The denomination of *mayor*, it is said on the authority of legal antiquaries, can be traced to a very far date among the German and French nations of Europe. The chief governor of the town communities which arose in France in the eleventh century, was often styled the mayor. It is a matter of history, that in France, the *mayor of the palace* was the governor of Paris, often holding sovereign power, and, indeed, in time, usurping it, since it was from one of the mayors of the palace that the family of Charlemagne descended. And it is suggested by Mr. Norton that the term mayor, familiar to the Normans, may have been originally, though remotely, derived from the same source: Norton's Com. pp. 90, 402, 403; see, also, Pulling's Laws, Customs, &c. of London, chap. II. 16 m.

¹ *Ante*, chap. I. sec. 9, and notes.

² Commonwealth v. Dugan, 12 Met. 233, 1847; Commonwealth v. Hastings, 9 Met. 259; *ante*, secs. 33, 34. In Massachusetts they are peace officers, and a person who assaults or obstructs them in the discharge of their duties, is indictable, though they have not been sworn—the statute not requiring this: Buttrick v. Lowell, 1 Allen, 172; Mitchell v. Rockland, 51 Maine, 118, 122. In The People v. Metropolitan Police Board, 16 N. Y. 188, 1859, growing out of the act to establish a Metropolitan Police District, it was decided by a majority of the Court of Appeals that, though the office was a new one, yet the mode of filling it not being provided by the constitution, it was in the power of the legislature to confer it upon persons discharging substantially the same duties within a more limited territorial jurisdiction, and to dispense with an oath of office. See, also, People v. Draper, 15 N. Y. 532, 1857, where the Court of Appeals held the "Act to establish a Metropolitan Police District" valid; approved, Metro-

Where police officers are, by statute, invested with all the powers of constables, as conservators of the peace, this gives them authority to *arrest, upon view*, intoxicated persons while guilty of disorderly conduct, or other persons violating the laws, and to detain them until they can be brought before a magistrate.¹ If such an officer releases an intoxicated person, whom he had arrested while conducting himself in a disorderly manner, upon his promise to go directly home, he may lawfully retake him, on his going into a bar-room before he is out of the officer's sight, and such arrest is justified, whether it be regarded as a re-

politan Board of Health *v.* Heister, 37 N. Y. 661, 1868; McDermott *v.* Metropolitan Police Board, 5 Abb. Pr. 422; Police Commissioners *v.* Louisville. 3 Bush (Ky.) 597, 1868; *ante*, sec. 33, and notes. Extent of legislative power and control over appointment, powers, &c. of police, health, and other local officers: Baltimore *v.* Board of Police (Baltimore Police Act), 15 Md. 376. 1859; Metropolitan Board of Health *v.* Heister, 37 N. Y. 661, 1868; People *v.* Huriburt, 24 Mich. 44, 1871; Police Commissioners *v.* Louisville, above cited *ante*, sec. 33, n. Mode of compensation: Worcester *v.* Walker, 9 Gray, 78.

¹ Taylor *v.* Strong, 3 Wend. 384, 1829; Bacon Ab. Constable, C.; Commonwealth *v.* Hastings, 9 Met. 259, 1843; Prell *v.* McDonald, 7 Kansas, 426, 1871. As to power of constables in such cases, see 1 Hale P. C. 587; Hawkins P. C. book II. chap. XIII. sec. 8. Where such a course is not repugnant to the general law of the state, the proper officers of a municipal corporation may authorize to arrest, *without warrant*, or upon view, offenders who violate ordinances in the presence of such officers. Bryan *v.* Bates, 15 Ill. 87, 1853; Main *v.* McCarty, 15 Ill. 442; State *v.* Lafferty, 5 Harring. (Del.) 491. *Post*, sec. 347, n.

Power to a city corporation to make ordinances for the security, or good order, or government of the place, and to appoint or elect officers to carry out ordinances, authorizes the appointment of city guards, or police officers, or peace officers, and such officers may arrest, without a warrant, persons engaged in breaches of the peace. City Council *v.* Payne, 2 Nott & McCord (South Car.) 475, 1820. A city council may authorize arrests *upon view*, without warrant, for violation of its by-laws, when not inconsistent with the general statutes or policy of the state. White *v.* Kent, 11 Ohio St. 550. 1860; Thomas *v.* Ashland, 12 *Ib.* 127. But not otherwise. Thus, where the city charter declared all by-laws inconsistent with the general law to be void, and where the general law did not allow an officer to arrest for a misdemeanor not committed in his presence, without a warrant, it was held that an ordinance authorizing police officers to make arrests, without a warrant, for violation of ordinances not committed in their presence, was void, and would not protect the officer against a suit for trespass. Pesterfield *v.* Vickers, 3 Coldw. (Tenn.) 205, 1866

caption for the original purpose, or as a new arrest for disorderly conduct still continuing.¹

§ 150. Charters authorizing municipal officers to make *arrests upon view*, and *without process*, are to be viewed in connection with the general statutes of the State, and being in derogation of liberty, are strictly construed; hence an officer making such an arrest, though on the Sabbath day, should instead of imprisoning, take, without unreasonable delay, the person arrested before the proper tribunal and prefer a complaint against him, as provided by the statutes of the State.²

§ 151. A city council authorized to *elect* certain officers, may, where no mode of election is prescribed, appoint them by *resolution*, and is not bound to elect them by ballot;³ and the corporation has full control, unless specially restricted, over all offices and officers existing only under by-laws.⁴ A vote of an authorized committee of a city,

¹ Commonwealth v. Hastings, *supra*. It follows that an obstruction offered by a third person, to the officer in making such an arrest, would be unjustifiable. *Ib.*

² Low v. Evans, 16 Ind. 486, 1868 (action for false imprisonment); Pow v. Becker, 3 Ind. 475, 1852; Vandever v. Mattock, 3 Ind. 479. In Low v. Evans it was held that there was no authority in the officer making the arrest for imprisoning the party arrested for an indefinite time (*e. g.*, from Sunday until the next day), because he may be subject to a penalty, to be recovered in a suit in the nature of an action of debt.

³ Low v. Commissioners of Pilotage, R. M. Charlt. (Geo.) 302, 1880, *per Law, J. Ante*, sec. 58. Power of council to appoint, and when it may delegate this power to a committee. People v. Bedell, 2 Hill (N. Y.) 196; Commonwealth v. Pittsburg (police force), 14 Pa. St. 177, 1850; Wilder v. Chicago, 26 Ill. 182; Russell v. Chicago (collectors), 22 Ill. 285; *ante*, sec. 60.

⁴ As to plenary power and control, when not restricted, of a municipal corporation over offices and officers existing only under ordinances, see People v. Conover, 17 N. Y. 64, 1858; Waldraven v. Memphis (right to abolish office), 4 Coldw. (Tenn.) 431, 1867; *infra*, sec. 170. Madison v. Korbly, 32 Ind. 74, 79, 1869. The power to appoint implies, in general, the power to remove the appointees. People v. Hill, 7 Cal. 97. Thus, a municipal corporation appointing commissioners in cases of local improvements, may remove them. People v. Mayor, &c. of New York, 5 Barb. 43, 1848. But in South Carolina, see Caulfield v. State, 1 S. C. 461, 1869. The exercise of the power to appoint to office is an executive, not a legislative act. Achley's Case, 4 Abb. Pr. 35, 1856.

electing their clerk city engineer for a year from a subsequent day, duly recorded, and signed by him as their clerk, is sufficient to take his appointment out of the statute of frauds.¹

§ 152. The same presumptions which are applicable to individuals are, in general, applicable to acts of corporations. Thus, if a person acts notoriously as the officer of a corporation, and is recognized by it as such officer, a *regular appointment will be presumed*, and his acts will bind the corporation, although no written proof is or can be adduced of his appointment.²

Oath and Official Bond.

§ 153. All public officers are usually required to take an *oath of office*, and those entrusted with money or property are also generally required *to give bond and sureties* for the faithful performance of their duties. In England it is said that an oath of office cannot be required to be taken by a by-law when none is required by the charter.³ But in this country the *oath of office* is, in substance, only that the officer will support the constitution and faithfully perform his official duties. And such an oath may, doubtless, be required, by ordinance, to be taken by every muni-

Chase v. Lowell, 7 Gray, 33, 1856.

¹ Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64, 70, where Mr. Justice Story cites many cases, establishing the principle "that the acts of artificial persons afford the same presumptions as the acts of natural persons."

² Rex v. Dean, &c., 1 Str. 539; Glover, 305; Willc. 133; Grant, 76. It is the settled doctrine of the Supreme Court, that the United States, being a body politic, with a capacity to enter into contracts, may, within the sphere and in the execution of its appropriate powers, take bonds and securities, which are not prohibited by law, though such bonds and securities may not have been prescribed by any pre-existing legislative act. These, though voluntary,—that is, not extorted or coerced,—if taken for a lawful purpose and upon a good consideration, are valid. United States v. Tingey, 5 Pet. (U. S.) 114, 128, 1831, approved, Same v. Linn, 15 Id. 290, 1841; and see Dugan v. United States, 3 Wheat. (U. S.) 172; United States v. Bradley, 10 Pet. (U. S.) 343. Right of city to require bond of indemnity from the owner, who proposes to excavate sidewalk to make cellars, vaults, or improvements. McCarthy v. Chicago, 53 Ill. 88, 1870.

cipal officer before entering upon his office. Statutes requiring an oath of office and bond are usually directory in their nature; and unless the failure to take the oath or give the bond by the time prescribed, is expressly declared, *ipso facto*, to vacate the office, the oath may be taken or the bond given afterwards, if no vacancy has been declared.¹

§ 154. When the statute requires a prescribed oath of office *before* any person elected “*shall act therein*,” a person cannot justify as such officer unless he has taken an oath in substantial, not necessarily literal, compliance with the law. Third parties, however, acting in good faith with him as such officer, are protected, notwithstanding his failure to take the requisite oath.²

¹ Smith v. Cronkhite, 8 Ind. 184; State v. Findley, 10 Ohio, 51, 59, and cases cited; State v. Porter (failure to give bond by city marshal in time), 7 Ind. 204; Sprawl v. Laurence, 33 Ala. 674; Bank v. Dandridge, 12 Wheat. 64; United States v. Le Baron, 19 How. 73; S. C., 4 Wall. 642; Marbury v. Madison, 1 Cranch. 137. A town *may lawfully require* a collector of taxes or other officer, to *furnish sureties* for the faithful discharge of the duties of his office. This power is incidental, and need not be express. If the person chosen neglects, or is unable, to furnish sureties, this amounts to a non-acceptance of the trust, although he has taken the oath of office. Morrell v. Sylvester, 1 Greenl. 248. While it is the duty of an officer to perfect his title to his office by complying with the *directions* of the law as to taking oath, depositing bonds, &c., yet his failure to do so is his own wrongful neglect, and is no defense to his sureties in an action on his official bond. State v. Toomer, 7 Rich. (South Car.) Law, 216, 1854; State v. Findley, 10 Ohio, 51, 1840.

A city council, whose duty it is to decide upon the sufficiency of the sureties of a city officer, cannot refuse to do so or postpone its decision because the title to the office is elsewhere disputed; and a *mandamus* will lie to compel it to act upon the sufficiency of the securities offered. Commonwealth v. City Council of Philadelphia, 7 Am. Law Reg. (N. S.) 362.

² Olney v. Pearce, 1 Rh. Is. 292, 1850, and authorities cited by Mr. Angell in note; Riddle v. Bedford County, 7 Serg. & Raw. 392; Neale v. Overseers, 5 Whart. (Pa.) 538. Where an officer, before acting, is required to qualify by taking an oath of office, he has no legal right, until he qualifies, to recover fees of an incumbent received after the plaintiff's appointment or election, and before he qualifies. Thompson v. Nicholson, 12 Rob. (La.) 326, 1845. See City v. Given, 60 Pa. St. 186. *Post*, sec. 174.

If members of a common council, who are required by the charter to be sworn before they enter on the duties of their office, are sworn before an officer not authorized to administer the oath, they are still officers *de facto*,

§ 155. The principal is well settled, that *official bonds* are valid if the *condition complies substantially* with the requirements of the statute. The exact form prescribed is not essential unless made so by the charter or act.¹ As such bonds are intended to secure the public the *courts do not favor technical defences*. Accordingly, actions have been sustained on bonds, not required by law, when executed voluntarily, and with proper conditions, to secure the performance of official duty.² And when required by law bonds are good, as common law obligations, though they do not conform to the statute, if they contain no condition contrary to law. In such case the obligor voluntarily agrees to make the obligee named a trustee for the persons interested in the due performance of the condition.³ Thus, an action may be maintained on a bond given to the "selectmen" instead of to the "town," by a town treasurer, conditioned for the faithful performance of his duties.⁴

and a tax levied by them is not invalid, and will not be set aside even in a direct proceeding. *State v. Perkins*, 4 Zab. (N. J.) 409, 1854.

An act of Congress provided that paymasters should, "*previous to entering upon the duties of their office, give good and sufficient bonds*," &c. It was held, that an appointment as paymaster was complete when made by the president and confirmed by the senate; that the giving of the bond was a mere ministerial act for the security of the government, and not a condition precedent to his authority to act as paymaster; and that a recital in the bond of the appointment estops the principal and sureties to deny the fact. *United States v. Bradley*, 10 Pet. (U. S.) 343, 1836; and see, also, *United States Bank v. Dandridge*, 12 Wheat. 64.

¹ *Allegheny County v. Van Campen*, 3 Wend. 49, 1829; *People v. Holmes*, 2 Wend. 281; *Id.* 615; *Fellows v. Gilman*, 4 Wend. 414; *Lawton v. Erwin*, 9 Wend. 233; *Cornell v. Barnes*, 1 Denio, 35.

² *Postmaster General v. Rice*, Gilpin, 554; *Montville v. Haughton*, 7 Conn. 543; *Commonwealth v. Wolbert*, 6 Binney, 292.

³ *Thomas v. White*, 12 Mass. 369; 5 *Id.* 314; *Kavanaugh v. Sanders*, 8 Greenl. 442; *Sweetzer v. Hay*, 2 Gray, 49, and cases there cited.

⁴ *Sweetzer v. Hay*, 2 Gray, 49; *Horn v. Whittier*, 6 N. H. 88. A bond given by the treasurer of a county for the faithful performance of his official duties, to the board of supervisors of the same county, is a good and valid bond, notwithstanding there may be no statute requiring one. *Supervisors v. Coffinbury*, 1 Mich. 355; *People v. Johr*, 22 Mich. 461, 1871.

Municipal corporations may sue on official bonds of public officers when interested therein. *State, &c. v. Norwood*, 12 Md. 177, 1858. In an action on the official bond of an officer appointed by a municipal corporation,

Duration of Official Term.

§ 156. It was a settled rule of law respecting the old corporations in England that the office of the mayor or other head officer was *annual*, and absolutely expired at the end of the year; and that without an express clause in the charter, he could not hold over until his successor was provided. The right, in such case, to *hold over* did not exist by implication, and was not an incident to the office.¹ In some charters, however, it was in terms provided that the mayor or other chief officer though elected for a year, should hold until his successor was chosen.² When this right existed it was frequently abused, by neglecting to hold an election on the charter day, by which means the officer continued his term. It was this abuse that gave rise to the Statute of Anne, which enacted "that no person in such *annual* office for one whole year, should be capable of being chosen into the same office for the year immediately ensuing," and imposed a fine upon every such officer who "should voluntarily and unlawfully obstruct and prevent the choosing of another person to succeed into such office at the time appointed for making another choice."³ Under the Municipal Corporations Act the provision is, that the mayor shall be elected each year, at the meeting fixed for the ninth of November, and shall "continue in his office

reciting the appointment of the principal as such officer, neither he nor his sureties can set up the invalidity of his appointment as a defence to an action for moneys collected. *Hoboken v. Harrison*, 1 Vroom (N. J.) 73; *Reple v. Elizabeth*, 3 Dutch. 407. Sureties on official bond of *de facto* municipal officer are liable for moneys collected by him; and this though he was an officer which, in point of fact, the corporation could not create. 1 Vroom, 73, *supra*. A surety in an official bond of an officer whose term is limited to a year, is not liable beyond the year, though the officer continues by law until a successor is provided. *Dover v. Twombly*, 42 N. H. 59, 1860; *Clemsford Co. v. Demorest*, 7 Gray, 1, 1856; *Mayor v. Horn*, 2 Harring. (Del.) 190, 1833.

¹ *Rex v. Atkyns*, 4 Mod. 12; *Rex v. Earle*, 1 Str. 627; *Mayor of Durham's Case*, 1 Sid. 33; *Rex v. Thornton*, 4 East, 308; *Foot v. Prowse*, 1 Str. 625; 8. C., 3 Bro. P. C. 169; Willc. 293; *Glover*, 173.

² *Ib.*; *Rex v. Phillips*, 1 Str. 394.

³ 9 Anne, chap. XX. sec. 8.

for one whole year,"¹ and by an amendment, until his successor shall have accepted the office of mayor, and made and subscribed the requisite oath;² and subsequently, the statute of Anne above mentioned was repealed, as being no longer necessary.³

§ 157. *At common law, the office of an alderman, jurat, capital burgess, or other member of a select body, is a franchise for life, though by prescription or charter it may be limited to a definite period, but the office was so much in the nature of a freehold that there was an implied right to hold over, unless it was otherwise provided.*⁴ So with respect to recorder, town clerk, and the like officers, the duration of the office depended upon the particular charter, but presumptively it was not limited, and their offices were so much in the nature of a freehold that if they are "eligible for a year" and are constituted in general terms, they do not expire with the year, but the possessors are entitled to hold over until others are elected. But it is considered that if they are "eligible for a year *only*," the office *ipso facto* determines on the expiration of the year.⁵

§ 158. In this country, however, a public office is not considered as being in the nature of a grant or contract, and the officer, as against the public, has no freehold or property in the office; and it is almost an invariable provision of law, that all officers shall be elected or appointed for a fixed and definite period. To guard against lapses, sometimes unavoidable, the provision is almost always made in terms that the officer shall *hold until his successor* is elected and qualified. But even without such a provision, the American courts have not adopted the strict rule of the English corporations, which disables the mayor or chief officer from holding beyond the charter or election

¹ 5 and 6 Will. IV. chap. LXXVI. sec. 49; *ante*, sec. 16, and notes; Reg. 7. McGowan, 12 A. & E. 869.

² 6 and 7 Will. IV. chap. CV. sec. 4.

³ 3 and 4 Vict. chap. XLVII.

⁴ *Rex v. Doncaster*, 2 Ld. Raym. 1564; *Foot v. Prowse*, *supra*.

⁵ Willc. 296, pl. 766; *Rex v. Durham*, 10 Mod. 147; *Dighton's Case*, 1 Vent. 82.

day, but rather the analogy of the other corporate officers, who hold over until their successors are elected, unless the legislative intent to the contrary be manifested.' Thus, in Vermont it is held,—there being no statute to the contrary, and such having been the practice,—that school officers elected at the annual meeting hold over until others are elected at another annual meeting, whether more or less than a year from the time of their election.'

§ 159. The law on this subject has been thus stated by a learned American judge: "Where, in the charter or organic law of a corporation, there is an express or implied restriction upon the time of holding office, as that the officers shall be annually elected on a particular day, and that they shall hold from one charter (election) day till the next, or that they shall be elected 'for the year ensuing *only*,' in such case they *cannot hold over* beyond the next election day or the end of the year.'" "But where, by the

¹ *People v. Rundle*, 9 Johns. 147; *Slee v. Bloom*, 5 Johns. Ch. 366, 378; 2 Kent Com. 238; *Kelsey v. Wright*, 1 Root (Conn.) 83; *Smith v. Natchez Steamboat Co.*, 1 How. (Miss.) 479; *Lynch v. Laffland*, 4 Cow. (Tenn.) 96; *South Bay, &c. Co. v. Gray*, 80 Maine, 547; *Elmendorf v. Mayor, &c. of New York*, 25 Wend. 693. And see cases *infra*.

² *Chandler v. Bradish*, 23 Vt. 416, 1851.

"The better opinion," says *Shaw*, C. J., *arguendo*, in *Overseers of Poor, &c. v. Sears*, 22 Pick. 122, 130, "is, that town officers *annually* chosen, hold their offices until others are chosen and qualified in their place." *School District v. Atherton*, 12 Met. 105, 1846; *Dow v. Bullock*, 13 Gray, 136, 1859. So in Illinois. *People v. Fairbury*, 51 Ill. 149, 1869. So in Connecticut, an officer elected for "the year ensuing" is, in the absence of any other restrictive provision, entitled to hold beyond the year, and until he is superseded by the election of another person in his place. *McCall v. Byram Manuf. Co.*, 6 Conn. 428, 1827, where the authorities are reviewed and commented on by *Hosmer*, C. J.; *S. P. Cong. Soc. &c. v. Sperry*, 10 Conn. 200; *Weir v. Bush*, 4 Litt. (Ky.) 433, where, by statute, an officer holds for a given term, and "until his successor is elected and qualified," he continues in office until his successor is duly elected and qualified, though this (from failure to elect, or from other causes), be after the expiration of the term. *Stewart v. State*, 4 Ind. 396, 1853; *Tuley v. State*, 1 Ib. 500, 515; *Ex parte Lawhorne*, 18 Gratt. (Va.) 85.

³ *Tuley v. State*, 1 Ind. (Cart.) 500, 502, 1849, *per Perkins*, J.; *King v. Mayor, &c.*, 6 Vin. Abr. 296; *Corporation of Banbury*, 10 Mod. 346; *Rex v. Rasmore*, 8 Term R. 199; 6 Petersd. Abr. 738. But whether a provision merely that an officer shall "be annually elected on a particular day," is

constitution of the corporation, the officers are elected for a term, and until their successors are elected and qualified, or where they are elected 'for the year ensuing,' and the charter or organic law contains no restrictive clause, the officers *may continue to hold* and exercise their offices, after the expiration of the year, until they are superseded by the election of other persons in their places.'''

§ 160. As against the public, however, officers cannot found a valid title or *right to hold over upon their own neglect of duty*. Therefore, where the charter made it the express duty of the trustees in office to give *notice of, and themselves to hold, the annual elections*, it was held, that

an implied restriction that he shall not hold over, see the cases in Vermont, Massachusetts, New York, Illinois, and Connecticut, above cited. The weight of authority in this country is the other way. Where a city charter gave the mayor power to hold until his successor was elected and qualified, but denied this power to the members of the city council by providing that they should be elected for a specified term, "*and no longer*," and that their seats should be vacated at the end of such term, they cannot hold over, and their action, after the time thus fixed, is void, and does not bind the corporation. *Louisville v. Higdon*, 2 Met. (Ky.) 526, 1859. When the law is silent as to the term, but requires an election to be held every two years, an officer holds over until his successor is provided. *Cordiell v. Frizzell*, 1 Nevada, 180.

¹ *Per Perkins, J.*, *Tuley v. State*, 1 Ind. (Cart.) 500, 502, 1849 (action on official bond against sureties). *Foot v. Prowse*, Str. 625; *Queen v. Durham*, 10 Mod. 146; *King v. Lisle*, Andrews, 163; *McCall v. Manufacturing Company*, 6 Conn. 428; 9 *Ib.* 536; 10 *Ib.* 200; 17 *Ib.* 588; *Kelsey v. Wright*, 1 Root, 88; *Weir v. Rush*, 4 Litt. (Ky.) 429; *People v. Runkle*, 9 Johns. 147; *Vernon Society v. Hills*, 6 Cow. 23; *Slee v. Bloom*, 5 Johns. Ch. 366; *Pender v. King*, 6 Vin. Abr. 296; 2 Kent Com. 295, note *b*; *Hicks v. Launcelot*, 1 Rol. Abr. 513; *Bank v. Petway*, 8 Humph. (Tenn.) 522; *Stewart v. State*, 4 Ind. 396; *Rex v. Poole*, Cas. Temp. Hardw. 23, and *Phillips v. Wickham*, 1 Paige Ch. 590, were considered to have a contrary bearing. It was decided, in *Beck v. Hanscom*, 9 Fost. (N. H.) 213, 223, 1854, that where the charter or incorporating act made no provision for the continuance of corporate officers in office after the expiration of the term for which they were elected, they could not hold over until others should be chosen and qualified; citing the opinion of Chancellor *Walworth*, in *Phillips v. Wickham*, 1 Paige, 590; but admitting that the *People v. Runkle*, 9 Johns. 147, and *Trustees v. Hills*, 6 Cow. 23, held a different view. In *People v. Tieman*, 8 Abb. Pr. 859; S. C., 80 Barb. 193, the Supreme Court, at special term, denied that the officer himself could hold over unless authorized by statute, though to protect the public his acts are sustained. *Cocke v. Halsey*, 16 Pet. 71.

if they omitted to discharge this duty, though inadvertently, in consequence of which omission there was and could be no election, that they were not entitled to *hold over*, although by the charter it was provided that they should continue in office until a new election should be made and their successors should qualify.¹

Vacancies in Municipal Offices.

§ 161. At common law there must be a *vacancy* in the office existing *at the time of the election*; “for one cannot,” says Mr. Willcock, “be elected to a corporate office in reversion.”² And the same doctrine has been recognized in this country, and a vacancy must exist before an election to fill it can be ordered,³ and an election to fill an anticipated vacancy is not valid unless expressly authorized by the charter or statute.⁴ Elections, however, in advance of the expiration of the regular term of the incumbent of an office, are always provided for and held, but such cases are not elections to vacancies within the meaning of the rule under consideration.

¹ *People v. Bartlett*, 6 Wend. 222, 1831. In such a case, being trustees *de facto*, their *acts* would be good. And their *title* would also be good except when called in question by *quo warranto*. *Ib.*; *Lynch v. Laffland*, 4 Coldw. (Tenn.) 96, 1867. Validity of acts of officers *de facto*. *People v. Stevens*, 5 Hill (N. Y.) 616, *per* Bronson, J.; *People v. Runkle*, 9 Johns. 147; *Trustees v. Hill*, 7 Cow. 23; *Plymouth v. Painter*, 17 Conn. 585; *Smith v. State*, 19 *Ib.* 493; *People v. Bartlett*, 6 Wend. 422; *State v. Jacobs*, 17 Ohio, 148; *Hinton v. Lindsay*, 20 Geo. 746. *Post*, secs. 214, 716.

² *Willc. Corp.* 207, pl. 526; *Hob.* 150; *Skin.* 45; *Glover*, 216.

³ *Lindsey v. Luckett*, 20 Texas, 516; *Biddle v. Willard*, 10 Ind. 63, 1857; *People v. Wetherell*, 14 Mich. 48.

⁴ *Biddle v. Willard*, *supra*. In this case it was said, that a resignation to take effect at a fixed future time may, if no new rights have attached, be withdrawn, even after acceptance, by the consent of the party accepting; and under the laws of that state it was held, that such a resignation did not create a vacancy which would authorize an election at a period prior to the taking effect of the resignation.

There is no technical or peculiar meaning to the word “vacant,” as used in the constitution. It means empty, unoccupied; as applied to an office, without an incumbent. There is no basis for the distinction urged, that it applies only to offices vacated by death, resignation or otherwise. An existing office, without an incumbent, is vacant, whether it be a new or an old one. *Per Stuart, J.*, *Stocking v. State* (vacancy in new judicial circuit), 7 Ind. 326, 1855; followed, *Collins v. State*, 8 *Ib.* 344, 1856.

Refusal to Serve in Office.

§ 162. It is an established common law principle, that since a municipal corporation is entitled to the official service of its eligible members, it may, by virtue of its inherent or incidental power, pass a by-law imposing a pecuniary penalty upon such as *refuse*, without legal excuse, *an office* to which they have been duly elected.¹ The ground of this doctrine is clearly set forth by Lord Holt in *Vanacker's Case*, and although all of his reasoning is not applicable to our American municipal corporations, still it is believed that under the usual general welfare clause, or under their incidental power to pass reasonable and necessary by-laws, they would be authorized, where such an ordinance did not contravene the charter or statute, or public legislative policy respecting offices, to impose a reasonable fine for refusing corporate offices. In this country, however, offices have not usually been regarded as burdens to be avoided, but rather, as distinctions to be coveted, and hence there has been little occasion to call into

¹ *City of London v. Vanacker*, 1 Ld. Raym. 496; S. C., Carth. 482; S. C., 12 Mod. 272; 1 Salk. 142; *Rex v. Bower*, 2 Dowl. & R. 761, 842; S. C., 1 Barn. & Cress. 587; *Vintners' Company v. Passey*, 1 Burr. 239; Willc. 230; Glover, 181; Grant, 211. If of a public and magisterial nature, the penalty for refusal may be imposed, though the person be also liable to be punished by indictment, or, in the discretion of the court, by criminal information. *London v. Vanacker*, 1 Ld. Raym. 499; *Rex v. Grosvenor*, 1 Wils. 18; S. C., 2 Str. 1193; *Rex v. Hungerford*, 11 Mod. 132, 142; *Rex v. Woodrow*, 2 Term R. 732; *Rex v. Whitwell*, 5 Term R. 86; *Rex v. Leyland*, 3 M. & S. 184. The Municipal Corporations Act (5 and 6 Will. IV. chap. LXXVI. sec. 51) requires every qualified person elected to the office of alderman, councillor, auditor, or assessor, or mayor, to accept the office or pay a fine to the borough fund. The refusal to take the requisite oaths is a refusal of the office. *Exon v. Starre*, 2 Show. 159. As there is a common law duty to serve in an office to which a person has been duly elected, this duty may, if the office be sufficiently important, be enforced by *mandamus*, and the payment of the fine is not in lieu of service unless the statute or by-law release him from service by treating the penalty as compensation. *Rex v. Bower*, 1 Barn. & Cress. 585; S. C., 2 Dowl. & R. 842; *Rex v. Leland*, 3 Maule & Sel. 185; *Rex v. Woodrow*, 2 Term R. 731. *Post*, sec. 667. By the above mentioned provision of the Municipal Corporations Act, the fine is in lieu of the acceptance of the office. Grant on Corp. 222.

exercise the power of the courts, or to test the authority of the corporations, to enforce the undertaking of their offices. If, under the charter or statute, an officer has the *right* to resign or lay down his office at pleasure, the authority to impose a fine for refusing to serve would probably not exist.¹

Resignation of Municipal Offices.

§ 163. An office *must be resigned* either (first) expressly, or (second) by implication.² If the charter prescribes the mode in which the resignation is to be made, that mode should, of course, be complied with.³ Acceptance by the corporation is, at common law, necessary to a consummation of the resignation, and until acceptance by proper authority, the tender or offer to resign is revocable.⁴ The right to accept a resignation is a power incidental to every corporation.⁵ It is also a common law principle that the right *to accept the resignation* of an officer is incidental to the power of appointing him.⁶ If no particular *mode* is

¹ See Willc. 133, pl. 308; Grant, 221, 222; *Gates v. Delaware County*, 12 Iowa, 405; *United States v. Wright*, 1 McLean, 509; *State, &c. v. Ferguson*, 31 N. J. (2 Vroom) 107.

² *Regents of University v. Williams*, 9 Gill & J. (Md.) 365, 422, 1838; Willc. 132, 238; Grant, 268, 246, note *c*; *Ib.* 221, 222.

³ Willc. 239; *Rex v. Hughes*, 5 Barn. & Cress. 886, 896; *Rex v. Mayor of Ripon*, 1 Ld. Raym. 563; *Rex v. Payne*, 2 Chitty, 366; *Reg. v. Morton*, 4 Q. B. 146.

⁴ *Rex v. Lane*, 2 Ld. Raym. 1304; *Rex v. Ripon*, *supra*; *Hazard's Case*, 2 Rol. 11; *Jenning's Case*, 12 Mod. 402; *Rex v. Patteson*, 4 B. & Ad. 9; 1 Nev. & Mann. 612. The acceptance may be by entry in books, by vote, or resolution, or by treating the place as vacant and electing another to fill it, or ordering an election if to be filled by a popular vote. *Van Orsdall v. Hazard*, 3 Hill (N. Y.) 243; *State v. Ancker*, 2 Rich. (South Car.) 245. One elected to an office cannot *resign* it before he has qualified and become an incumbent of it. *Miller v. Supervisors, &c.*, 25 Cal. 93; Willc. 236.

⁵ *Rex v. Tiddlerley*, 1 Sid. 14; *Hazard's Case*, *supra*. The "common council" may regulate resignations by by-laws, and it may accept resignations, as it represents the corporation at large. Rawlinson (5th ed.) 317, note; *Staniland v. Hopkins*, 9 M. & W. 178; Willc. 240, pl. 615.

⁶ *Van Orsdall v. Hazard*, 3 Hill (N. Y.), 243; asserting, *arguendo*, the incidental power of municipal corporations, *as such*, to accept resignations, and approving the opinion of Mr. Willcock (*Munic. Corp.* 240), who observes, respecting the cases on this subject: "I presume that a right to

prescribed, neither the resignation or acceptance thereof need be in writing, or in any form of words.'

§ 164. An office may be *impliedly resigned* or vacated by the incumbent being elected to and accepting an *incompatible office*. The rule, says *Parke, J.*, in a leading English case on this subject, that where two offices are incompatible they cannot be held together, is founded on the plainest principles of public policy, and has obtained from very early times.¹ The principle applies not only where the second office is the superior and more important one, but also where it is not.² The rule has been generally stated in broad and unqualified terms, that the acceptance of the incompatible office by whomsoever the appointment or election might be made, absolutely determined the original office, leaving no shadow of title in the possessor, whose successor may be at once elected or appointed, neither *quo warranto* nor amotion being necessary.³

§ 165. The doctrine just stated is undoubtedly true where the acceptance of the second office is made by or with the privity of that authority which has the power to accept the surrender of the first or to remove from it; but "such acceptance does not operate as an absolute avoidance in cases where a person cannot divest himself of an office by his own mere act, but requires the concurrence of another

accept a resignation passes incidentally with a right to elect." See, also, *Rex v. Tidderley*, 1 Sid. 14, *per Hale*, Ch. B.; *Jenning's Case*, 12 Mod. 402; *Taylor's Case*, Poph. 183.

¹ Same authorities; and see, also, *Rex v. Ripon*, 1 Ld. Raym. 563; S. C., 2 Salk. 433; *Regina v. Lane*, 1 Ld. Raym. 1304; *Jenning's Case*, 12 Mod. 402; *Regina v. Gloucester*, Holt R. 450; *Van Orsdall v. Hazard*, 3 Hill (N. Y.) 243, 248; *State v. Allen*, 21 Ind. 516, 1863; *People v. Police Board*, 26 N. Y. 316; *McCunn's Case*, 19 *Ib.* 188, distinguished.

² *Per Parke, J.*, *Rex v. Patteson*, 4 Barn. & Adol. 9, 1832; 1 Nev. & Mann. 612; *Regents of the University v. Williams*, 9 Gill & Johns. (Md.) 365, 1838; 1 Kyd, 369-375.

³ *Milward v. Thatcher*, 2 Term R. 87, which settled this point conclusively; *Rex v. Trelawney*, 3 Burr. 1615; *Gabriel v. Clarke*, Cro. Car. 138; *Rex v. Godwin*, Doug. 383, note 22; Willc. 240, pl. 617; Glover, 189.

⁴ *Gabriel v. Clark*, *supra*; *Verrior v. Sandwich*, 1 Sid. 305; *Milward v. Thatcher*, *supra*; Glover, 329; Willc. 240, pl. 617.

authority to his resignation or amotion, unless that authority is privy and consenting to the second appointment.''' If one holding an office in a corporation be by that corporation elected to an incompatible office, this, of course, is a consent on the part of the corporation that the first office be vacated, and if the second office be accepted, the first is at once and *ipso facto* determined. But, until acceptance, the former office is not vacated.'

§ 166. The rule under consideration is not limited to corporate offices, but extends, both in its principle and application, to all public offices. Thus, if a Judge of the Common Pleas accepts an appointment to the King's Bench, the first office is vacated, since it is the duty of the one to correct the errors of the other.'

Whether offices are incompatible depends upon the charter or statute, and the nature of the duties to be performed.' The same man cannot be judge and minister in

¹ *Parke, J., Rex v. Patteson, supra.* It has been held in this country, however, that an incumbent of a public office may lay it down at his pleasure, and that the officer to whom the resignation, by law, is to be made cannot forbid it or refuse it; and that when received by such officer it operates to vacate the office resigned. *Gates v. Delaware County*, 12 Iowa, 405; *United States v. Wright*, 1 McLean, 509. See, however, *State, &c. v. Ferguson*, 31 N. J. (2 Vroom) Law, 107; *Lewis v. Oliver*, 4 Abb. Pr. R. 121; *People v. Porter*, 6 Cal. 26.

² *Ib.* *Milward v. Thatcher, supra*; *Rex v. Pateman, supra*; Willc. 243, pl. 623; *Arkwright v. Cantrell*, 7 Ad. & E. 565. Acceptance necessary: see, also, *State v. Ferguson*, 31 N. J. (2 Vroom) Law, 107, 1864; see *Lewis v. Oliver*, 4 Abb. Pr. 121. Acceptance of an incompatible office, even under a void election, puts an end to the first office, and the officer, on being ousted from the second office, cannot be restored to the first. *Rex v. Hughes*, 5 B. & C. 386; *Rex v. Bond*, 6 D. & R. 333.

³ *Glover on Corp.* 139.

⁴ *Milward v. Thatcher, supra, per Buller, J.*; *People v. Carrigue*, 2 Hill (N. Y.) 93, and cases cited; *Staniland v. Hopkins*, 9 M. & W. 178.

Incompatibility in offices exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both. It does not necessarily arise when the incumbent places himself, for the time being, in a position where it is impossible for him to discharge the duties of both offices. *Bryan v. Cattell*, 15 Iowa, 538, 1864, *per Wright, C. J.*; and accordingly that case held that the office of district attorney and of captain in the volunteer service of the

the same court, and hence the offices are not compatible.' Where the recorder is an adviser to the mayor, the two offices cannot be held together.'

§ 167. An office may be *vacated by abandonment*.¹ A *voluntary enlistment* by a civil officer in *the military service* of the United States for three years, or during the war, vacates the civil office, being a constructive resignation by abandonment.² So where residence within the corporation is necessary in order to be eligible to hold an office, permanent removal from the municipality may undoubtedly be taken as evincing an intention to resign, and as an implied resignation.³

Compensation of Municipal Officers.

§ 168. We have had occasion to discuss the *complete supremacy of the legislature* over public corporations, limited only by express constitutional restraints.⁴ Its authority over public offices, which are created or authorized solely for the public convenience, is equally great,⁵ and may be conferred upon municipal corporations with respect to municipal offices. The legislature, in the absence of con-

United States were not legally incompatible. Two offices are incompatible where the holder cannot, in every instance, discharge the duties of each. *Per Bailey, J., Rex v. Tizzard*, 17 Eng. C. L. 193.

¹ Poph. 28, 29; 1 Sid. 305; 2 Keb. 93; Glover, 139.

² Willc. 241, pl. 518; *Rex v. Marshall*, cited, 2 B. & A. 341. *Clerk* of a school district *and collector* of the district were held not incompatible, and the same person may, therefore, be appointed to both offices, there being no prohibition in the act. *Howland v. Luce*, 16 Johns. 135, 1819. The offices of *councilman and city marshal* are incompatible. *State v. Hoyt*, 2 Oregon, 246. See, generally, as to incompatible *state and federal offices*: *Respublica v. Dallas*, 3 Yeates (Pa.) 316; S. C., 4 Dall. 229; *Commonwealth v. Binns*, 17 Serg. & Rawle, 219; *Commonwealth v. Ford*, 5 Barr (Pa.) 67.

³ Willc. 238; *State v. Allen*, 21 Ind. 516, 1863.

⁴ *State v. Allen*, 21 Ind. 516, 1863. But see *Bryan v. Cattell*, 15 Iowa, 537.

⁵ Willc. 238. *Ante*, sec. 134.

⁶ *Ante*, chap. IV

⁷ *Ante*, chap. IV. As to special constitutional restrictions, *ante*, sec. 33, 34.

stitutional limitation, may create and abolish offices, add to, or lessen, their duties, abridge or extend the term of office, and increase, diminish, or regulate, the compensation of officers at its pleasure.¹

§ 169. There is no such implied obligation on the part of municipal corporations, and no such relation between them and officers which they are required by law to elect, as will oblige them to *make compensation* to such officers, *unless the right to it is expressly given* by law, ordinance, or by contract.² Officers of a municipal corporation are deemed to have accepted their office with knowledge of, and with reference to, the provisions of the charter or incorporating statute relating to the services which they may be called upon to render, and the compensation provided therefor. Aside from these, or some proper by-law, there is no implied assumpsit on the part of the corporation with respect to the services of its officers. In the absence of express contract, these regulate the right of recovery, and the amount. If the charter or by-laws provide for a peculiar mode of compensation, as, for example, to a city surveyor, for superintending grading of streets, by an assessment upon the property owners, the city is not liable before

¹ *Ante*, chap. IV. and see, also, *Conner v. Mayor, &c. of New York*, 1 Seld. (N. Y.) 285, 1851; affirming S. C., 2 Sandf. S. C. R. 855; *Warner v. People*, 7 Hill, 81; 2 Denio, 272; *People v. Morrell*, 11 Wend. 563, 1839; *Phillips v. Mayor, &c. of New York*, 1 Hilt. (Com. Pl.) 483; *Bryan v. Cattell*, 15 Iowa, 538, 553, *per Wright*, C. J.; *Coffin v. State*, 7 Ind. 157, 1855; *People v. Mahaney*, 13 Mich. 481; *Turpen v. County Commrs.*, 7 Ind. 172; *Oregon v. Pyle*, 1 Oregon, 149; *Bird v. Wasco Co.*, 3 Oregon, 282, 1871; *Cowdin v. Huff*, 10 Ind. 83; *Cooley Const. Lim.* 276; *Butler v. Pennsylvania*, 10 How. 402; *Smith v. New York*, 37 N. Y. 518, 1868; *Swann v. Buck*, 40 Miss. 268, 1866. While the office is continued, and the officer not removed, he is entitled to salary. *Hoke v. Henderson*, 4 Dev. (N. C.) 1; *Cotten v. Ellis*, 8 Jones (N. C.) Law, 545.

² *Sikes v. Hatfield*, 13 Gray, 347, 1859; *Barton v. New Orleans*, 16 La. An. 817; *Garnier v. St. Louis*, 37 Mo. 554, 1866. It is advisable that salaries should be fixed by ordinance, and not voted as a matter of grace and favor. *Smith v. Commonwealth*, 41 Pa. St. 335. *Devoy v. New York*, 39 Barb. 169; *Bladen v. Philadelphia*, 60 Pa. St. 464. See opinion of *Thompson*, C. J., *Philadelphia v. Given*, *Id.* 136. Municipal corporations are not liable for services performed by an officer under an unconstitutional statute. *Meagher v. County*, 5 Nev. 244, 1869. *Post*, sec. 730.

it collects the money, if it makes the requisite assessments, and is proceeding with proper diligence to enforce them¹

§ 170. A municipal corporation *may*, unless restrained by charter, or unless the employment is in the nature of a contract, *reduce or otherwise regulate the salaries and fees* of its officers, according to its view of expediency and right. Although an officer may be elected or appointed for a fixed period, yet where he is not bound, and cannot be compelled to serve for the whole time, such election or appointment cannot be considered a contract to hire for a stipulated term. Ordinances fixing salaries are not in the nature of contracts with officers.²

¹ *Baker v. City of Utica*, 19 N. Y. 326; *People v. Supervisors*, 1 Hill, 362; *Cumming v. Mayor, &c. of Brooklyn*, 11 Paige, 596; *Jersey City v. Quaife*, 2 Dutch. (N. J.) 63; *Andrews v. United States*, 2 Story C. C. 203; *United States v. Brown*, 9 How. 487; *Barton v. New Orleans*, 16 La. An. 395; *McClung v. St. Paul*, 14 Minn. 420, 1869; *Smith v. Commonwealth*, 41 Pa. St. 835. "It is very plain to us that a town officer, *as such*, has no legal claim against the town to recover pay for services rendered, unless by an express vote of the town, or an uniform usage to pay that particular officer from year to year, for his services. And in the latter case, it would be very questionable whether a recovery at law could be had, if it had all along been left to the town to make such compensation as they should deem reasonable, after the services had been rendered. * * * The same principle has always been recognized in this state in regard to all officers. If no law of the state fixed their fees or pay, their services must be gratuitous." *Per Redfield, J., Boyden v. Brookline*, 8 Vt. 284, 1836. But the decision (in *Boyden v. Brookline*, 8 Vt. 284.) does not extend strictly beyond *official* services, and when a town agent, acting for the town, or the town itself, employs an attorney at law to prosecute or defend suits against the town, the latter is liable for the services. And the rule is the same if the "town agent," being an attorney, renders for the town professional services, in suits which the proper authorities of the town directed to be instituted. *Langdon v. Castleton*, 30 Vt. 285, 1858.

² *Commonwealth v. Bacon*, 6 Serg. & Rawle (Pa.) 322, 1820; followed, *Baker v. Pittsburg*, 4 Pa. St. 49, 1846 (abolishing annual salary of collector of tolls); also, approved: *University v. Walden*, 15 Ala. 655, 1849, but distinguished; *Carr v. St. Louis*, 9 Mo. 190; *Comw. v. Mann*, 5 W. & S. (Pa.) 418; *Smith v. County*, 2 Par. (Pa.) 293; *Madison v. Kelso*, 32 Ind. 79; *Warner v. People*, 2 Denio, 272; *Conner v. Mayor, &c. of New York*, 1 Seld. 285, 296; *Augusta v. Sweeny*, 44 Geo. 463, 1871. In an action against a city treasurer, on his official bond, for moneys received by him, he cannot charge commissions for the whole term at the rate allowed by law at his accession to office, when his compensation has been changed to a lower rate subse-

§ 171. But where the services to be performed are professional or private, rather than public or official, an employment under an ordinance for a fixed time, at a fixed sum for the period, has been held to be a contract, and not subject to be impaired by the corporation. Thus, the appointment or election by a city council, for a *fixed and definite* period, of a city officer—for example, a city engineer, for one year, at the rate of one thousand dollars per year—if accepted by him, constitutes, in the opinion of the Supreme Court of Massachusetts, a contract between him and the city, and the city, in such a case, has no authority, unless expressly conferred, to abolish or shorten the term of office, so as to deprive the officer, without his consent, of the right to compensation for the full period, unless for misbehavior or unfitness to discharge the duties of the place.¹

quently. *Iowa City v. Foster*, 10 Iowa, 189; *supra*, sec. 151. In *Commonwealth v. Bacon*, *supra*, it was held that an ordinance which reduced the salary of the mayor after the commencement of his term, was valid. The court said, "this cannot be considered in the nature of a hiring for a year, because it was not obligatory on the mayor to serve out the year." Though ordinance may fix term and compensation of officer, the office may be abolished, if its abolition be not forbidden, or salary reduced. There is no contract between corporation and officer that the service shall continue, or the salary not be changed. *Waldraven v. Memphis*, 4 Coldw. (Tenn.) 431, 1867; *Hoboken v. Gear*, 3 Dutch. (N. J.) 265, 1859. General power to a corporation to fix the compensation of its officers does not authorize it to take away the fees of an officer, which are *specifically* fixed by the same charter. *Carr v. St. Louis*, 9 Mo. 190, 1845. The legislature may provide that the salary of an officer may be fixed by one board, *e. g.*, a common council, though it is payable by another, *e. g.*, a county, or board of supervisors, and in that case, the latter have no authority to change it when once fixed. *People v. Auditors of Wayne*, 13 Mich. 238.

¹ *Chase v. Lowell*, 7 Gray, 83, 1856; and see *Caverley v. Lowell*, 1 Allen (Mass.) 289, 1861, as to ordinance constituting a contract with city attorney. These cases, if really distinguishable from the others, should not, it is believed, be extended, but the principle limited to instances where the services are not essentially official in their nature, and where the officer or other party is bound to serve for the fixed and definite period.

A resolution of the council empowering an individual to collect the taxes due the city, at a given rate per cent. on the amount collected for his compensation, may be repealed or modified at any time by the corporation, on the sole condition that it shall be liable for any compensation earned under the resolution previous to its repeal or modification. *Hiestand v. New*

§ 172. It is a well settled rule that a person accepting a public office, with a fixed salary, is bound to perform the duties of the office for the salary. He *cannot legally claim additional compensation* for the discharge of these duties, even though the salary may be a very inadequate remuneration for the services. Nor does it alter the case that by subsequent statutes or ordinances his duties within the *scope of the charter powers pertaining to the office* are increased and not his salary. Whenever he considers the compensation inadequate, he is at liberty to resign. The rule is of importance to the public. To allow changes and additions in the duties properly belonging or which may properly be attached to an office to lay the foundation for extra compensation, would soon introduce intolerable mischief. The rule, too, should be very rigidly enforced. The statutes of the legislature and the ordinances of our municipal corporations seldom prescribe with much detail and particularity the duties annexed to public offices; and it requires but little ingenuity to run nice distinctions between what duties may, and what may not, be considered strictly official; and if these distinctions are much favored by courts of justice, it may lead to great abuse.¹

Orleans, 14 La. An. 330, 1859. The court did not regard the resolution as creating a contract, or, if so, it was one of mandate, revocable at the will of the principal. *Ib.*

¹ *Per Potts, J.*, in Court of Errors and Appeals, *Evans v. Trenton*, 4 Zab. (N. J.) 766, 1853. See, also, *Andrews v. United States*, 2 Story C. Ct. 202; *Palmer v. The Mayor, &c. of New York*, 2 Sandford (N. Y.) 318; *Bussier v. Pray*, 7 Serg. & Rawle, 447; *Angell & Ames on Corp. sec. 317*; *Gilmore v. Lewis*, 12 Ohio, 281; *Detroit v. Redfield*, 19 Mich. 376, 1869.

A *salaried* officer of a public corporation has no claim for compensation *extra* his salary, on the ground that the duties of his office have been increased, or new duties added since the salary was fixed. *People v. Supervisors*, 1 Hill (N. Y.) 362; *Wendell v. Brooklyn*, 29 Barb. 204; *Palmer v. Mayor, &c. of New York*, 2 Sandf. (N. Y.) 318. Special instances, where a claim for compensation, in the absence of express provision, has been sustained, where the law has required a public officer to perform a duty, attended with trouble and expense, clearly *outside* of his regular official duties, see *People v. Supervisors*, 12 Wend. 257; *Bright v. Supervisors*, 18 Johns. 242; *Mallory v. Supervisors*, 2 Cowen, 531; *Ib.* 533; *Detroit v. Redfield*, 19 Mich. 376, 1869. This subject is discussed in *White v. Polk County*, 17 Iowa, 418.

Where salary is fixed by ordinance, it cannot be changed by a commit-

§ 173. Not only has an officer, under such circumstances, no legal claim for extra compensation, but a *promise to pay him an extra fee or sum beyond that fixed by law is not binding*, though he renders services and exercises a degree of diligence greater than could legally have been required of him.¹

Liability of Corporation to the Officer.

§ 174. Where an officer of a municipal corporation, elected by the people for a specified term, is *improperly removed* by the city council, he may sue the corporation for his salary and perquisites for the time intervening his removal and the expiration of his term.² It is a defence to

the corporation or individual members of the corporation; nor will their promise to pay extra compensation for the duties of the office be binding on the corporation. But for services performed by request, not part of the duties of his office, and which could as appropriately have been performed by any other person, such officer may, in proper cases, recover a just remuneration. *Evans v. Trenton*, 4 Zabr. (N. J.) 764, 1853. S. P., *Detroit v. Redfield*, 19 Mich. 876, 1869; *Converse v. United States*, 21 How. 463. For services required by ordinances, *the city attorney* is entitled to the compensation fixed by ordinance, and no other; and the mayor, by virtue of his duty to see that the "ordinances are duly enforced," cannot bind the corporation to pay more than the fixed salary or compensation, and this duty does not authorize that officer to employ assistant or independent counsel in any case, at the expense of the corporation. *Carroll v. St. Louis*, 12 Mo. 44, 1849. Further, as to liability of city to attorneys, see the chapter on Contracts.

¹ *Heslep v. Sacramento*, 2 Cal. 580 (\$10,000 voted to mayor for meritorious services, held void); *Hatch v. Mann*, 15 Wend. 44; reversing S. C., 9 *Ib.* 262; approved *Palmer v. Mayor, &c. of New York*, 2 Sandf. 218; *Bartho v. Salter*, Latch, 54; *W. Jones*, 65; *S. C. Lane v. Sewell*, 1 Chitty, 175; *Ib.* 295; *Morris v. Burdett*, 1 Camp. 218; 3 *Ib.* 374; *Callaghan v. Hallett*, 1 Caines (N. Y.) 104; S. C., Col. & C. Cas. 179; *Preston v. Bacon*, 4 Conn. 471; *Shattuck v. Woods*, 1 Pick. 175; *Bussier v. Pray*, 7 Serg. & Rawle, 447; *Carroll v. Tyler*, 2 Har. & Gill, 54; *Smith v. Smith*, 1 Bailey, 70; *Debolt v. Cincinnati*, 7 Ohio St. 237; *Pilie v. New Orleans*, 19 La. An. 273. The principle operates to deprive a public officer, or an officer of a municipal corporation, of a claim for a reward offered for a service which is embraced in his official or legal duties. *Gilmore v. Lewis*, 12 Ohio, 281, where a constable who arrested a thief was held not entitled to a reward offered by the defendant. S. P., *Pool v. Boston*, 5 Cush. 219. See *ante*, chap. VI. sec. 91.

² *Stadler v. Detroit*, 18 Mich. 846, 1865; *Shaw v. Mayor, &c.*, 19 Geo. 468, 1856. The court, in considering the *rule of damages* in such a case, hold

the corporation that the officer was *legally* removed ; but if he was illegally removed, it is no answer to the action that the corporation, in making the removal, acted judicially, and therefore is not liable for the error it committed.¹

that the officer cannot recover of the corporation counsel fees for defending himself against the charges preferred against him, but may recover such "damages as necessarily resulted from his amotion from office, viz: his salary and perquisites." 19 Geo. 468, *supra*. But the corporation, it is suggested, may recoup the same as individuals who improperly dismiss servants employed for a determinate period. 2 Greenl. Ev. sec. 261*a*. But see *United States v. Addison*, 6 Wall. 291; *Hoke v. Henderson*, 4 Dev. 1.

¹ *Shaw v. Mayor, &c.*, 19 Geo. 468, 1856; *Shaw v. Mayor, &c.*, 21 Geo. 280; see *S. C. Mayor, &c. v. Shaw's Administrator*, 25 Geo. 590. In the case last cited, it was decided that if the removal of a city officer be for a specified cause, not warranting the removal, and the officer sue the corporation for his salary, as a defense to such action it may aver and prove other matters, good in law, to justify such removal. In thus holding, the court say: "If his term of office had not expired when this suit was instituted, and he had moved for a *mandamus* to restore him, instead of bringing an action for his salary, the court would not have interfered, if good cause for his removal could have been shown, although he may have been removed without notice. *Rex v. Mayor, &c.*, 2 Cowp. 523; *The King v. The Mayor, &c.*, 2 Term R. 182"—*per McDonald, J.*; 25 Geo. 590. 592. See *Hoboken v. Gear*, 3 Dutch. (N. J.) 265. An incumbent was appointed by the aldermen and removed by the mayor, who nominated a successor; the incumbent's salary did not cease until his successor was confirmed. *White v. Mayor, &c. of New York*, 4 E. D. Smith, 568, 1855.

Declaring an office and the prospective fees of the officer not to be property, and that the right to fees grows out of *services performed*, it was decided by the Court of Appeals that a municipal officer who had been kept out of his office and had not performed its duties, could not maintain an action against the city to recover the amount of fees accruing from the office. *Smith v. New York*, 37 N. Y. 518, 1868; *Hadley v. Mayor*, 38 N. Y. 603, 607, *per Denio*, C. J.; *Benoit v. Wayne County*, 20 Mich. 176, *Cooley, J.*, dissenting. It has, however, several times been decided in California that the salary annexed to a public office is *incident to the title* to the office, and not to its occupancy and exercise, and that the right to compensation is not affected by the fact that an usurper, officer *de facto*, has discharged the duties of the office. *Dorsey v. Smith*, 28 Cal. 21; *Stratton v. Oulton*, *Id.* 44; *Carroll v. Siebenthaler*, 37 *Id.* 193, 1869; approved *Meagher v. County*, 5 Nev. 244, 1869. See *People v. Miller*, 24 Mich. 458, 1872; *Benoit v. Wayne County*, *supra*; *Philadelphia v. Given*, 60 Pa. St. 136, *per Thompson*, C. J.

The legal incumbent of a municipal office rendering service is entitled to compensation until he has actual notice of his removal. *Jarvis v. Mayor, &c. of New York*, 2 N. Y. Leg. Obs. 396. *As to notice*: *Field v. Common*

Liability of the Officer to the Corporation and to Others.

§ 175. Public officers, elected pursuant to statute by a municipal corporation, are not the servants or agents of the corporation in such a sense as will enable the *corporation*, in the absence of a statute giving the remedy, to recover *damages against such officers* for negligence in the discharge of their official duty. If the corporation can recover at all in such an action, it can only be for want of fidelity and integrity, not for honest mistakes.¹ To protect the

wealth, 32 Pa. St. 478, 1849; *Ex parte* Ramshay, 83 Eng. C. L. 174, 1852; *Ex parte* Hennen, 13 Pet. 230; *Queen v. Governors, &c.*, 8 Ad. & El. 682; *Page v. Hardin*, 8 B. Mon. (Ky.) 648; *Bowerbank v. Morris*, Wall. C. C. R. 118. In *The City v. Given*, 60 Pa. St. 136, the plaintiff acted as city commissioner for some months, when it was decided that he had not been duly elected, and, in a suit brought for his salary, it was held that he could not recover, because he had not qualified by giving security. In an action by the rightful officer on a *supersedeas bond* given in a *quo warranto* proceeding by an intruder, the measure of damages is the full amount of the salary (where the office has a fixed salary) received by the intruder pending the operation of the *supersedeas*. *United States v. Addison*, 6 Wall. 291. See *people v. Miller*, 24 Mich. 458, 1872.

Respecting *liability of an intruder* to the officer *de jure* for salary and fees received, and when an action will lie for money had and received. *Glascock v. Lyons*, 20 Ind. 1; *Douglas v. State*, 31 Ind. 479; *Dorsey v. Smythe*, 28 Cal. 21; *Stratton v. Oulton*, *Ib.* 44; *City v. Given*, 60 Pa. St. 136; *Allen v. McKean*, 1 Sumn. 117; *State v. Sherwood*, 42 Mo. 179; *Hunter v. Chandler*, 10 Am. Law Reg. (N. S.) 440, and note; *Boyter v. Dodsworth*, 6 Term R. 681; *Sadler v. Evans*, 4 Burr. 1984; *People v. Miller*, 24 Mich. 458.

¹ *Parish in Sherburne v. Fiske*, 8 Cush. 264, 266, 1851, opinion by *Dewey*, J.; cites *White v. Philipson*, 10 Met. 108; *Trafton v. Alfred*, 8 Shepl. 258; *Kendall v. Stokes*, 3 How. 87; *Commonwealth v. Genther*, 17 Serg. & Rawle, 135; *Wilson v. Mayor, &c. of New York*, 1 Denio, 595; *Hancock v. Hazzard*, 12 Cush. 112; *Minor v. Bank*, 1 Pet. (U. S.) 46, 69. Where a surveyor of highways has, by law, a discretion as to the kind of repairs, and exercises his best judgment and acts in good faith, the corporation for which he acts is bound, and cannot defeat his recovery for the price of materials furnished by evidence to show that the repairs were not, in fact, necessary. But it would be otherwise if fraud or corruption were shown. *Palmer v. Carroll*, 4 Fost. (N. H.) 814, 1851. See, also, *People v. Lewis*, 7 Johns. 78; *Seaman v. Patten*, 2 Caines, 312.

Personal liability of municipal Councillors to the corporation for misappropriation of its funds: see *municipality of East Nissouri v. Horseman*, 16

public, however, officers are usually required to give bonds, in which case they are, of course, liable, as we have seen, according to the conditions thereof. By charter, the power to appoint policemen was conferred on a board of police, composed of the mayor and recorders, and this board was authorized to discharge policemen, for cause, and to “decide on all police matters pertaining to appointments, dismissals, &c., *finally and without appeal.*” In an action for wages, brought against the city by a policeman, who claimed that he had been appointed for a year and dismissed at the end of a month, without good cause, the Supreme Court decided that the board having dismissed the plaintiff for what it deemed sufficient cause, its decision was final, and the sufficiency of the cause of dismissal was not inquirable into in the action.¹

§ 176. In this country the *officers of municipal corporations are*, in many respects, *public officers*, being charged with duties which concern both the corporation and the public at large. The duties and liabilities of such officers to the corporation fall within the scope of this treatise, and have been considered. But their *individual* rights and their liability to others, upon contracts and for torts, are not, strictly speaking, embraced in the plan of the work. It has, however, been thought, that a brief reference to some of the more important rules and adjudications on this subject was desirable, and this has accordingly been made in the note.²

Upper Canada Q. B. 588. Of treasurer for paying money on an illegal order or resolution: *Daniels v. Burford*, 10 Up. Can. Q. B. 481.

¹ *Nolan v. New Orleans*, 10 La. An. 106, 1855.

² *SUTTS.*—Public officers have, in general, a *power to sue* commensurate with their duties. If officers of a corporate body, suit should be brought in the *name of the corporation*, unless the statute direct otherwise. *Stock v. State*, 6 Ind. 118; *State v. Rush*, 7 *Ib.* 221; *Supervisors v. Stimpson*, 4 Hill, 186, and cases cited; *Todd v. Birdsall*, 1 Cow. 260, and cases cited in note; *Jansen v. Ostrander*, 1 Cow. 670; *Cornell v. Guilford*, 1 Denio, 510; compare *Commissioners v. Perry*, 5 Ohio, 57; *Barney v. Bush*, 9 Ala. 845; *Van Keuren v. Johnson*, 8 Denio, 182. But it has been held, that a public officer cannot, without the aid of a statute, maintain a suit in his own name, although he may have taken a note or contract to himself individually, if the consideration for such a note or contract be a liability to the state. The

Amotion and Disfranchisement.

§ 177. The elementary works treat of Amotion and Disfranchisement together: indeed, formerly, the important

ground of this rule is public policy to discourage public officers from transacting, in their own name, the business of the public. *Hunter v. Field*, 20 Ohio, 340, 1851; *Irish v. Webster*, 5 Greenl. (Me.) 171; *Gilmore v. Pope*, 5 Mass. 491. If the obligation is taken to the officer as agent, or in his official capacity, the action is properly brought in the name of the government beneficially interested. *Dugan v. United States*, 8 Wheat. 172; *S. P. United States v. Boice*, 2 McLean, 352; *United States v. Barker*, 1 Paine C. Ct. 152; 2 Parsons on Notes and Bills, 451, and other cases cited. An action by a public officer does not *abate* by the expiration of his term of office. The suit may be continued in his name until its termination, or, by the practice in many of the States, his successor may be substituted. *Kellar v. Savage*, 20 Maine, 199, 1841; *Todd v. Birdsall*, 1 Cow. 260; *Haynes v. Covington*, 13 Sm. & Mar. 408; *Grant v. Faucher*, 5 Cow. 869; *Colgrove v. Breed*, 2 Denio, 125; *Manchester v. Herrington*, 10 N. Y. 164; *Upton v. Starr*, 3 Ind. 538.

EVIDENCE.—Where the authority of an officer of a public corporation comes incidentally in question in an action in which he is not a party, it is sufficient to show that he was an acting officer, and the regularity of his appointment or election cannot be made a question. Proof that he is an acting officer is *prima facie* evidence of his election or appointment, as well as of his having duly qualified. But if he relies alone on proof of a due election or appointment, such election or appointment must be legally established. *Pierce v. Richardson*, 37 N. H. 306, 1858; *Tucker v. Aiken*, 7 N. H. 113; *Johnson v. Wilson*, 2 N. H. 202; *Baker v. Shephard*, 4 Fost. (N. H.) 212, 1851, and cases cited; *Bean v. Thompson*, 19 N. H. 290; *Blake v. Sturdevant*, 12 N. H. 573; *Burgess v. Pue*, 2 Gill (Md.) 254. An officer, even when justifying, may *prima facie* establish his official character by proof of general reputation, and that he acted as such officer. *Johnson v. Steadman*, 3 Ohio, 94; followed, *Eldred v. Seaton*, 5 *Ib.* 215; *Berryman v. Wise*, 4 Term R. 366; *Potter v. Luther*, 6 Johns. 431; *Wilcox v. Smith*, 5 Wend. 233; *People v. McKinney*, 10 Mich. 54. But it is not enough to show that the officer was acting officially in the particular instance in controversy in the case upon trial, and in which his authority is questioned. *Hall v. Manchester*, 39 N. H. 295, 1859. An acting officer is estopped to dispute the validity of his own appointment and election. *State v. Sellers*, 7 Rich. Law, 368; *State v. Mayberry*, 3 Strob. 144.

ACTS AND DECLARATIONS of officers, when evidence for or against the corporation. *Mitchell v. Rockland*, 41 Me. 363; *Jordan v. School District*, 38 *Ib.* 1864; *Morrell v. Dixfield*, 30 *Ib.* 157; *County v. Simmons*, 5 Gilm. (Ill.) 516; *Railroad Company v. Ingles*, 15 B. Mon. 637; *Glidden v. Unity*, 33 N. H. 577; *Toll Co. v. Betsworth*, 30 Conn. 380; *Barnes v. Pennell*, 2 H.

distinction between the two was not observed. A motion relates alone to *officers*; disfranchisement, to *corporators* or

of L. Cas. 497. See chapter on Corporate Records and Documents, *post*. The *acts* of the officers of municipal corporations in the line of their official duty, and within the scope of their authority, are binding upon the body they represent, and *declarations* and *admissions* accompanying such acts as part of the *res gestæ*, calculated to explain and unfold their character, and not narrative of past transactions, are competent evidence against the corporation. To render such declarations and admissions evidence, they must accompany acts, which acts must be of a nature to bind the corporate body. *Glidden v. Unity*, 33 N. H. 571, 1856.

NOTICE.—Where the officers or agents of a public corporation have no powers or duties with respect to a given matter, their individual knowledge, or the individual knowledge of the inhabitants or voters, do not bind or affect the corporation. *Harrington v. School District*, 30 Vt. 155, 1858; *Angell & Ames Corp.* sec. 239; *Hayden v. Turnpike Co.*, 10 Mass. 397. The mayor is chief executive officer of the city, and notice to him of a nuisance is sufficient, when it would not be to the clerk, who is only a recording officer, not authorized to act upon the notice. *Nichols v. Boston*, 98 Mass. 39, 1867; *ante*, secs. 147, 148.

INDICTMENT OF PUBLIC AND CORPORATE OFFICERS.—“A public officer,” it is declared in North Carolina, “instructed with definite powers to be exercised for the benefit of the community, who wickedly abuses or fraudulently exceeds them, is punishable by indictment.” *State v. Glasgow*, North Car. Conf. R. 186, 187 (indictment of secretary of state); *State v. Justices, &c.*, 4 Hawks (North Car.) 194 (when county authorities indictable for non-repair of jail); see *Paris v. People*, 27 Ill. 74; *State v. Commissioners of Fayetteville* (non-repair of streets), 2 North Car. Law, 617; *Ib.* 633; 2 Murph. 371. But see as to street commissioner: *Graffurs v. Commonwealth*, 3 Pa. (Penn. & W.) 502; *State v. Commissioners*, Walk. (Miss.) 368. Indictment of municipal officers for violation of charter. *People v. Wood*, 4 Park. Cr. R. 144; *Hammer v. Covington*, 3 Met. (Ky.) 494; *State v. Shelbyville*, 4 Sneed (Tenn.) 176; *State v. Shields*, 8 Blackf. 151; *Lathrop v. State*, 6 Blackf. 502; *State v. Burlington*, 36 Vt. 521. *Requisites of indictment* for non-performance of official duty. *Waters v. People*, 13 Mich. 446; *State v. Mayor*, 11 Humph. 217; *State v. Commissioners*, 2 Dev. 345; 3 Chitty Crim. Law, 586, 606, for precedents of indictments against corporations. *Criminal information* against municipal officers. *Willc. Corp.* 315–318; *Rex v. Watson*, 2 Term R. 204; *Ib.* 198. Indictment against *municipal corporations*. See chapter on Remedies against Illegal Corporate Acts, *post*, secs. 745, 747.

LIABILITY FOR MONEYS RECEIVED.—A public or municipal officer, who is required to account for and pay over money that comes into his hands, is liable, though it be stolen without his fault, unless relieved from this responsibility by statute. *Halbert v. State*, 22 Ind. 125, 1864; *Muzzy v. Shattuck*, 1 Denio, 238; *State v. Township*, 28 Ind. 86; *Hancock v. Hayard*, 12 Cush. 112; *United States v. Prescott*, 3 How. (U. S.) 578; *Commonwealth v.*

members of the corporation. Amotion, therefore, is the removal of an officer in a corporation from his office, but it

Coneley, 4 Pa. St. 372; *State v. Harper*, 6 Ohio St. 707. And a direction to a public officer (*e. g.* a county treasurer) how and where to keep the money (*e. g.* in a safe provided by the county), if made by a board or authority having no legal control or power over the matter, will not be a defence to such officer if the money is stolen from the safe. *Halbert v. State*, *supra*. It is no defence to a tax collector to recover moneys received by him,—that he received the money on account of taxes which the legislature had no constitutional power to impose. *Waters v. States*, 1 Gill (Md.) 302, 1843; *Thompson v. Stickney*, 6 Ala. 579; *Evans v. Trenton*, 4 Zabr. 764. Treasurer held not entitled to credit for money paid contractors upon warrants not drawn according to the charter. *McCormick v. Bay City*, 23 Mich. 457.

LIABILITY ON CONTRACTS.—Public and municipal officers are not personally liable on contracts within the scope of their authority and line of duty, unless it is very apparent that they intended to bind themselves personally. *Macbeth v. Haldeman*, 1 Term R. 172, and *Hodgden v. Dexter*, 1 Cranch, 145, are the leading cases. The question is, to whom was the credit given?—did the defendant contract in his public or private capacity? See *Olney v. Wickes*, 18 Johns. 122, where the promise was held not personal. Compare *King v. Butler*, 15 Johns. 281; *Gill v. Brown*, 12 Johns. 385; *Walker v. Swartout*, *Id.* 444; *Mott v. Hicks*, 1 Cow. 513; *Sheffield v. Watson*, 2 Caines, 69; commented on, 12 Johns. 448; *Brown v. Rundlett* (full discussion), 15 N. H. 360, 1844, and cases cited and criticised; *Belknap v. Rheinhardt*, 2 Wend. 375; *Adams v. Whittlessey*, 3 Conn. 560; 8 *ib.* 329; *Hammerskold v. Bull, et al.* (“state capitol commissioners”), 11 Rich. (South Car.) Law, 493; *Lesley v. White*, 1 Speers, 31; *Young v. Commissioners of Roads*, 2 Nott & McC. 537; *Miller v. Ford*, 4 Rich. (South Car.) Law, 376; S. C., 4 Strob. 213; *Copes v. Mathews*, 10 Sm. & Marsh. 398; *Tucker v. Shorter*, 17 Geo. 620; *Hall v. Cockrell*, 28 Ala. 507, 1856; but *quære*, as to its correctness. In *Nickerson v. Dyer*, 105 Mass. 320, the agents or committee of a town were held not to be personally liable. *Post*, chap. XIV. In the absence of a provision to the contrary, an officer of a municipal corporation is not disabled from entering into a contract with it. *Municipality v. Caldwell*, 3 Rob. (La.) 368, 1842. It is held, that where the officers of a public or municipal corporation, acting officially, and under an innocent mistake of the law, in which the other contracting party equally participated, with equal opportunities of knowledge, neither party at the time looking to personal liability, the officers *are not, in such case, personally liable*, nor is the corporation liable. *Houston v. Clay County* (unauthorized contract by township trustees for the erection of a bridge), 18 Ind. 396, 1862; *Boardman v. Hayne*, 29 Iowa, 839, 1870; *Duncan v. Niles*, 32 Ill. 532, 1863, and cases cited; *Ogden v. Raymond*, 22 Conn. 379, 1853; *Dameron v. Irwin*, 8 Ire. Law. 421, 1848; *Hite v. Goodman*, 1 Dev. & Bat. Eq. 364, 1836; *Ives v. Hulet*, 12 Vt. 314, 1840; *Stone v. Huggins*, 28 *Id.* 617; *Tucker v. Justices*, 13 Ire. (Law) 434; *Dey v. Lee*, 4 Jones (Law) 238; *Tucker v. Shorter*, 17 Geo. 620; *Copes v. Mathews*, 10 Sm. & Marsh. 398; *Hall v. Cockrell*, 28

leaves him still a member of the corporation. Disfranchisement is to destroy or take away the franchise or right of

Ala. 507; compare *Potts v. Henderson*, 2 Ind. (Carter) 327, 1856. Liability under statute, of trustees or directors of public works who make unauthorized contract: *Higgins v. Livingstone*, 4 Dow. 341; *Parrott v. Eyre*, 10 Bing. 283; *Wilson v. Goodman*, 4 Hare, 54.

TAX COLLECTOR'S LIABILITY TO THIRD PERSONS.—Tax collector liable in trespass who seizes without color of law for tax assessment, or under an unconstitutional law. *McCoy v. Chillicothe*, 3 Ohio, 370; *Ragnet v. Wade*, 4 *Ib.* 107; *Loomis v. Spencer*, 1 Ohio St. 150. But a collector whose warrant is in due form, with nothing on its face to show the illegality of the tax or the want of authority in the assessors or previous officers, will be protected in executing it, even though the tax be not lawfully assessed. *Chegary v. Jenkins*, 1 Seld. (N. Y.) 376, 1861; affirming S. C., 3 Sandf. Sup. Ct. R. 409; *Abbott v. Yost*, 2 Denio, 86; *Savacool v. Boughton*, 5 Wend. 170, 1830, leading case; *Downing v. Rugar*, 21 Wend. 178, warrant of justice to overseers of poor; *Alexander v. Hoyt*, 7 Wend. 89; *Clark v. Halleck*, 16 Wend. 607; *People v. Warren*, 5 Hill, 440; *Webber v. Gray*, 24 Wend. 440; *Loomis v. Spencer*, 1 Ohio St. 153; *Little v. Merritt*, 10 Pick. 547; see *Suydam v. Keys*, 13 Johns. 444; *Gale v. Mead*, 2 Denio, 160; *Ib.* 232; *Easton v. Callender*, 11 Wend. 90; *Clark v. Norton*, 49 N. Y. 243.

LIABILITY OF PUBLIC OFFICERS FOR ACTS OF SUBORDINATES.—Public officers are not liable for the misconduct or malfeasance of such persons as they are *obliged* to employ; the reason here being, that the maxim of *respondeat superior* has no application, there being no freedom of choice as to the selection and control of agents. *Bailey v. Mayor, &c.*, 3 Hill (N. Y.) 531, 1842; affirmed in error, 2 Denio, 433, 1845; *Hall v. Smith*, 2 Bing. 156; *Pritchard v. Keefer*, 53 Ill. 117; *Humphreys v. Mears*, 1 Man. & Ryl. 187; *Bolton v. Crowther*, 2 Dowl. & Ryl. 195; *Harris v. Baker*, 4 Maule & Selw. 27. See, also: *Lane v. Cotton*, 1 Salk. 17; Story on Agency, 320, *et seq.*; Story on Bail. 300, 302; *Martin v. Mayor, &c.*, 1 Hill, 545, 551; *Mayor, &c. v. Furze*, 3 Hill (N. Y.) 612, 618.

LIABILITY OF PUBLIC OFFICERS FOR ACTS JUDICIAL IN THEIR NATURE.—Officers are *not liable* for honest errors or mistakes of judgment as to acts within the scope of their authority, *judicial* in their nature, in the absence of malice, or corruption, or statute imposing the liability. *Ramsey v. Riley*, 13 Ohio, 157; *Stewart v. Southard*, 17 *Ib.* 402; *Conwell v. Emrie* (road supervisor), 4 Ind. 200; *Bartlett v. Crozier* (highway overseer), 17 Johns. 439; *Freeman v. Cornwall* (highway overseer), 10 *Ib.* 470; *Johnson v. Stanley*, 1 Root (Conn.) 245; *Township v. Carey*, 3 Dutch. 377; *Waters v. Waterman*, 2 *Ib.* 214; *Craig v. Burnett*, 32 Ala. 728; *State v. Dunnington*, 12 Md. 340; *Commissioners v. Nesbitt*, 11 Gill & J. 50. Liability where the officer's function is *quasi judicial*. *Wilkes v. Dinman*, 7 How. 89, where the subject is much considered, and malice or willful wrong held to be essential. *Waldron v. Berry*, 51 N. H. 136, 1871. The members of a city council are not individually liable, in a civil or criminal action, for acts involving the exercise of discretion, unless they act corruptly. *Walker v.*

being any longer a *member* of the corporation.¹ American municipal corporations are, in many respects, essentially

Hallock, 32 Ind. 239, 1869; *Baker v. State*, 27 Ind. 485. *Public duty*, not ordinarily enforceable by private action against the officer, unless given by statute. *Foster v. McKibben*, 14 Pa. St. 168. *Misapplication of public funds* by officer. *Township, &c. v. Linn*, 36 Pa. St. 431. Neglect to take a *bond* required by law. *Boggs v. Hamilton*, 2 Const. (South Car.) R. 381; *State v. Dunnington*, 12 Md. 340. A municipal officer misled into issuing order not liable to the holder. *Boardman v. Hayne*, 29 Iowa, 839.

LIABILITY FOR TORTS.—*Alvord v. Barrett* (town clerk), 16 Wis. 175; *American Print Works v. Lawrence*, 3 Zab. 590, 601. *No liability* for acts done by a public officer under lawful authority and in a proper manner. *Ib.* Full discussion and cases cited by *Carpenter, J.* S. P. in S. C., 1 Zab. 248, 260, *per Green, C. J.*; *Caldins v. Baldwin*, 4 Wend. 667, and cases cited. How far protected by an *unconstitutional* statute. *Ib.* Liability for *nonfeasance* or *misfeasance*, where the duty is specific, imperative, and not judicial, in its nature. *Griffith v. Follett*, 20 Barb. 630, 1855; *Weaver v. Devendorf*, 3 Denio, 117; *Harmon v. Brotherson*, 1 Denio, 537; *Ib.* 595; *Adsit v. Brady*, 4 Hill (N. Y.) 630, 1843. The principle on which a public officer is held personally liable for injuries resulting from improper execution of official duties, is well stated in *Nowell v. Wright*, 3 Allen, 166. In *Amy v. Supervisors*, 1 Wall. 136, 1870, where county supervisors were held to be personally liable for failing to levy a tax, as commanded by the court, to pay the plaintiff's judgment, Mr. Justice *Swayne*, stating the principle of the decision, says: "The rule is well settled, that where the law requires absolutely, a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct; mistake of duty and honest intentions will not excuse the offender." Liability for *fraud*: *Oakland v. Carpenter*, 13 Cal. 540. *Post*, secs. 147 n., 730 n. A *ministerial officer*, acting in good faith, is liable for actual, but not for exemplary damages, for illegal acts injurious to private persons. *Tracy v. Swartout*, 10 Pet. (U. S.) 80, 1836 (action against collector of customs); *Ib.* 137; *Jenner v. Joliffe*, 9 Johns. 382. A provision of law making a civil corporation liable "for the illegal doings and defaults" of its officers (there being no provision that the officers shall not also remain liable) does not deprive the party injured of his right to proceed, personally, against the officer or agent who committed the injury. Both are liable. *Rounds v. Mansfield*, 38 Maine (3 Heath) 586, 1854. *Election officers* for refusing vote, when liable. *Gordon v. Farrer*, 2 Doug. (Mich.) 411; *Carter v. Harrison* 5

¹ 2 Kyd, 50-94; Willc. 245-276; Glover, chap. XVI. pp. 327-328; Grant, 250, 263. And see 2 Kent Com. 278, 297, where amotion and disfranchisement are used as convertible terms. Angell & Ames Corp. chap. XII. where the cases are very fully collected, and the doctrine of the English decisions satisfactorily presented.

different in their constitution from the old English municipal corporations, under which most of the cases on the subject of Amotion and Disfranchisement, usually cited in the books, arose. These cases are often inapplicable here, and should, it is believed by the author, be followed by our courts as precedents with unusual caution, and only when they rest upon or declare principles general in their nature, and which embrace in their operations municipal institutions possessing the distinctive characteristics of ours. Here, the inhabitants of the municipality are the corporators; certain of those inhabitants (usually all of the adult male residents), have the right to elect the legislative or governing body, and also, frequently, the other more important officers of the corporation. It would seem that the English doctrine of *disfranchisement* of a corporator or member has no application to our municipal corporations, whether the corporator be considered the "inhabitant," or the "voter."

§ 178. Whether the power of disfranchisement be *incidental* to the corporation, or must be *expressly conferred*, respecting which there is in England some contrariety of view,¹ we need not inquire, for here (were there no constitutional obstacles) the legislature never bestows upon the council or governing body which represents the corporation the right to disfranchise the citizen or corporator, and it is clear that such a formidable and extraordinary authority does not exist, and cannot be exercised by the council, as an incidental or implied right. To burn or destroy the charters of the corporation, or willfully to falsify its books, were in England, considered such breaches of duty on the part of a corporator as would work a forfeiture of the cor-

Blackf. 138; Jeffries v. Ankeny, 11 Ohio, 374; compare Ramsey v. Riley, 13 Ohio, 157. See Jenkins v. Waldron, 11 Johns. 114; Lincoln v. Hapgood, 11 Mass. 350; Bridge v. Lincoln, 14 *Ib.* 367. *Collection and revenue officers* not liable to the party paying for money voluntarily paid to them. Elliott v. Swartout, 10 Pet. 137, 1836; Thompson v. Stickney, 6 Ala. 579. When liable in trespass. McCoy v. Chillicothe, 3 Ohio, 370; Loomis v. Spencer, 1 Ohio St. 153. *Recording officer.* Ramsey v. Riley, 13 Ohio, 157; approved, Stewart v. Southard, 17 *Ib.* 402.

¹ Grant, 263. "This right [of disfranchisement] has been but sparingly exercised, though it is undoubtedly an *incident* to every corporation, with

porate character,¹ there being according to Lord Coke, “a tacit condition annexed to the franchise, which, if he break, he may be disfranchised.”² Surely, there is here no such tacit condition annexed to the right of a resident of a municipality to be and remain a corporator, though there may be a similar condition annexed to municipal offices. Willfully to destroy or falsify the charter or books of a municipal corporation is an act which is punishable by the criminal codes of the different states, and if the offender is convicted and imprisoned, it may result as an incident of such conviction that he will cease, for the time, to be a resident, and hence, will cease to be a member of the corporation; but the corporation itself has no power to disfranchise him, that is, to deprive him of the privileges and rights, without absolving him from the liabilities of other citizens, while he remains within the limits of the municipality.

179. The power *to amove a corporate officer* from his office, for reasonable and just cause, is one of the common law incidents of all corporations.³ This doctrine, though

perhaps, some exceptions in cases of trading and monetary bodies.” *Ib.* Willcock (271, pl. 709) denies that it is an incidental right, and claims that the rule laid down in the second resolution (Bagg’s Case) on this point, that “no freeman of any corporation can be disfranchised by the corporation, unless they have authority to do so by the express words of the charter, or by prescription,” is the law. Mr. Glover simply adopts Mr. Willcock’s language. Glover, 335. Mr. Kyd’s exposition of the *second* resolution in Bagg’s Case, 2 Kyd, 52. And see leading case of *Rex v. Richardson*, 1 Burr. 517, which was a case of amotion, but has been often taken as asserting an incidental power to disfranchise for cause as well as amove. Angell & Ames, secs. 408, 409; see generally, *Commonwealth v. St. Patrick’s Society*, 2 Binn. 448, 1810; *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Hopkinson v. Marquis of Exeter*, Law Rep. 5 Eq. 63; *State v. Georgia Med. Soc.*, Am. Law Reg. (N. S.) 533, Mr. Mitchell’s note.

¹ *Mayor v. Pilkinton*, 1 Keb. 597; *Rex v. Chalke*, 5 Mod. 257; 1 Lord Raym. 226; *Grant Corp.* 265.

² 13 Coke. 98, *a*.

³ *Rex v. Richardson*, 1 Burr. 517; *Rex v. Liverpool*, 2 Burr. 723; *Rex v. Doncaster*, 2 Burr. 738; *Jay’s Case*, 1 Vent. 302; *Lord Bruce’s Case*, 2 Stra. 819; *Rex v. Ponsonby*, 1 Ves. Jr.; *Rex v. Lyme Regis*, Doug. 153; *Rex v. Tidderly*, 1 Sid. 14, *per Hale*, C. B.; *Rex v. Taylor*, 3 Salk. 231; 1 Roll. Rep. 409; S. C., 3 Bulst. 189; *Rex v. Chalke*, 1 Lord Raym. 225; *Rex v. Heven*,

declared before,' has been considered as settled ever since Lord Mansfield's judgment in the well-known case of the *King* against *Richardson*.¹ It is there denied that there can be no power of amotion unless given by charter or prescription; and the contrary doctrine is asserted, that from the reason of the thing, from the nature of corporations, and for the sake of order and government, the power is incidental.

§ 180. But the power to amove, like every other *incidental* power, is incident to the corporation *at large*, and not to any select body or particular part of it, and unless delegated to a select body or part, it must be exercised by the *whole corporation*, and at a *corporate assembly* regularly and *duly convened*.² The power to hold such an assembly is, however, implied in the power of amotion.³

§ 181. By the *corporation at large*, as here used, is meant the different ranks and orders which compose it, including the definite and indefinite bodies. The essentials in such a corporation of a valid corporate assembly have elsewhere been described. Our corporations, however, have no

2 Term R. 772; Reg. v. Newbury, 1 Queen's Bench, 751; 2 Kyd, 50-94, where the old cases are digested; Glover, chap. XVI.; Willc. 246; Grant, 240; Angell & Ames, chap. XII.; 2 Kent Com. 297.

¹ Lord Bruce's Case, Stra. 819, 820; Tidderley's Case, 1 Sid. 14, *per Hale*, C. B.

² Rex v. Richardson, 1 Burr. 517 (31 George II.) "It is necessary to the good order and government of corporate bodies that there should be such power [amotion], as much as the power of making by-laws." *Ib.*

³ Lord Bruce's Case, 2 Stra. 819; Rex v. Lyme Regis, Doug. 153; Rex v. Richardson, *supra*; Rex v. Doncaster, Say. 38; Rex v. Taylor, 3 Salk. 321; Rex v. Feversham, 8 T. R. 356; Fane's Case, Doug. 153; Willc. 246, pl. 629; Grant, 240, 241; 2 Kyd, 56; Glover, 329; State v. Jersey City, 1 Dutch. (N. J.) 536, 1856. Even if the right to elect an officer be in a particular person or select class, the power to amove is not incidental to it, but unless expressly changed or limited by charter, it belongs to the corporation at large. Lord Mansfield seemed to be of opinion that it was competent to transfer this power from the whole body to a select body by an ordinance, or by law. Bagg's Case, 11 Co. 99, *a*; Rex v. Richardson, 1 Burr. 539. But this question seems not to have been directly determined. Willc. 247, pl. 634; *Ib.* 248, pl. 635; State v. Jersey City, 1 Dutch. (N. J.) 536.

⁴ Fane's Case, Doug. 153; Rex v. Lyme Regis, *Ib.* 149.

ranks, orders, or integral parts corresponding strictly to the constitution of an old English corporation. Here the common council, or the elective governing body (whatever name be given to it), exercises all of the powers of the incorporated place. Has the council, as the representative of the corporation, the incidental powers of a corporation, such as the power to amove, or the power to ordain by-laws? or is the council in the nature of a select body, possessing no right to exercise any of the ordinary incidental powers of the corporation, unless expressly authorized by charter or legislative grant? The question not being judicially settled as to our municipal corporations, the opinion is ventured that, in the absence of an express grant or statute conferring or limiting the power, the common council of one of our ordinary municipal corporations, in the absence of any express or implied restriction in the charter, does possess the incidental power not only to make by-laws, but, for cause, to expel its members, and, for cause, to remove corporate officers, whether elected by it or by the people. Whatever necessity or reason exists for the right of amotion at common law with respect to the corporation at large, exists here with respect to that authorized body by which alone the corporation acts, and which exercises all its powers and functions. All of the inhabitants cannot meet and act in their primary capacity, except in organizations like the *towns* in the New England states, and if the right of amotion exist at all, it must be exercised by the council or governing body of the corporation. If it does not exist in the council, it cannot be *delegated* to it by an ordinance or by any act of the corporation, though if the right does exist, its exercise may, of course, be regulated by ordinance or by-law.¹

¹ See, generally, Willard's Appeal, 4 Rh. Is. 597; State, &c. v. Trustees, &c., 5 Ind. 89; State v. Bryce, 7 Ohio, part II. p. 82; Commonwealth v. St. Patrick's Society, 2 Binn. (Pa.) 448; Commonwealth v. Bussier, 5 Serg. & Rawle, 451; Commonwealth v. Guardians, &c., 6 Serg. & Rawle, 469; Commonwealth v. Sutherland, 3 Serg. & Rawle, 145; Johns v. Nicholls, 2 Dall. 184; 1 Yeates, 80; People v. Comptroller, &c., 20 Wend. 595; State, &c. v. Lingo, 26 Mo. 496; Fawcett v. Charles, 13 Wend. 473; Hoboken v. Gear, 3 Dutch. 265; People v. Board of Trade, 45 Ill. 112, 1867; Neall v. Hill, 16 Cal. 145; State v. Chamber of Commerce, 20 Wis. 63; People v. Medical Society, 24 Barb. 570; Evans v. Philadelphia Club, 50 Pa. St. 107; State v. Georgia Medical Society, 8 Am. Law Reg. (N. S.) 533, and note; Smith v.

§ 182. A provision in a city charter vesting the board of aldermen with the sole power to *try all impeachments of city officers*, the judgment only extending to removal and disqualification to hold any corporate office under the charter, is not unconstitutional as authorizing the exercise of judicial powers by a legislative or municipal body, but is rather the exercise of a power necessary for its police and good administration.¹

§ 183. When the terms under which the power of amotion is to be exercised are prescribed, they *must be pursued with strictness*.² Whether, if the power to expel

Smith, 3 Desaus. 557. But see *State v. Jersey City*, 1 Dutch. (N. J.) 536, in which the power to expel a member of the council was expressly conferred, but where Mr. Justice Potts, delivering the opinion of the court, says:—

“The rule is well settled, that a corporation has, at common law, an inherent jurisdiction to expel a member for sufficient cause.” After noticing the offenses which will justify expulsion, he adds: “But the jurisdiction in this case is not derived from the common law. The common council is not the corporation, and, whatever powers a municipal corporation may have to amove or expel a member at common law, it is clear that the corporation itself has not, by any by-law, delegated any of them to the common council, and that body, therefore, cannot avail itself of the common law jurisdiction, vested as an inherent right in the corporation itself, to expel a member of their own body. 2 Bac. Abr. 21, title *Corporations*; Willc. on Corp. 629. The council derives its jurisdiction from the charter of the corporation.” This case rules that where, in express terms, the right of the council to expel a member for certain causes is given, it cannot exercise the power for any other cause. And it would seem to be the opinion of the court, or at least of the judge delivering the opinion, that the common law power of expulsion belonging to a corporation could not be exercised by the common council, that body not being the corporation in which the power is vested. Same principle as to private corporations. *State v. Chamber of Commerce*, 20 Wis. 72. Compare *People v. Board of Trade*, 40 Ill. 113.

¹ *State v. Ramos*, 10 La. An. 420. See *People v. Bearfield*, 35 Barb. 254, *supra*, sec. 139. A board of aldermen sitting in a judicial capacity as a court of impeachment to try charges preferred against a city officer by another branch of the municipal governing body, is a court of limited jurisdiction, and if not sworn, or not sworn by an officer authorized to administer oaths, their proceedings and judgment of guilty are void, and create no vacancy. *Tompert v. Lithgow*, 1 Bush (Ky.) 176, 1866. See *Hadley v. Mayor, &c.*, 33 N. Y. 603, cited *infra*, sec. 191, note.

² *State v. Lingo*, 26 Mo. (5 Jones) 496; *State v. Trustees of University*, 5 Ind. 77, 89, 1854; *State v. Bryce*, 7 Ohio, part II p. 82; *State v. Chamber*

or remove be given for certain causes, this excludes the right to exercise the power in any other case, will depend upon the intent of the legislature to be gathered from a consideration of the whole charter or statute. Power to appoint "subject to removal only for," &c., clearly limits the power of removal to the specified causes.¹ Express power of expulsion or removal for specified reasons was, in New Jersey and in Georgia, considered to exclude any implied power, or to limit the right to the enumerated causes.²

§ 184. A charter of a municipal corporation gave to the common council express power to "*expel* a member for *disorderly conduct*," and one of the aldermen being guilty of official corruption in receiving bribes, was, after a hearing, expelled from the council. The court was of opinion that the question as to the right to expel for the conduct charged, depended upon the construction of the words "disorderly conduct," and it held that receiving bribes for his official influence and votes was *disorderly conduct*, within the meaning of the charter.³ In another case, the charter

of Commerce, 20 Wis. 63; *Regina v. Sutton*, 10 Mod. 76; *Paston v. Urber*, Hutt. 103; *Regina v. Ricketts*, 7 Ad. & El. 966; *Regina v. Oxford*, 6 Ad. & El. 349; *Commonwealth v. Sutherland*, 3 Serg. & Rawle, 145; *Commonwealth v. Shaver*, 3 Watts & S. 338. In the *Queen v. Sutton*, *supra*, so strictly was a clause in a charter conferring the right of removal construed, that it was held that where acts were to be done by a *majority*, that word was to be understood as a majority of the whole corporation, and that if the officer whose removal was proposed was a member, it could be effected only by a majority of all the members, including himself, and that his personal interest did not exclude him from voting as a member upon the question. See, also, *State v. Jersey City*, 1 Dutch. (N. J.) 536; *Madison v. Korbly*, 32 Ind. 74; *State v. McGarry*, 21 Wis. 496, where "other cause" for removal was held to mean "other *like* cause."

¹ *People v. Higgins*, 15 Ill. 110.

² *State v. Jersey City*, 1 Dutch. 536, 1856; *The Mayor, &c. v. Shaw*, 16 Ga. 172, 1854. See S. C., 19 *Ib.* 468; 21 *Ib.* 280; 25 *Ib.* 590. But see *Commonwealth v. St. Patrick's Society*, 2 Binn. 441; 4 *Ib.* 448; *Angell v. Ames*, sec. 415. Under the Illinois statute, it is held that the *county* authorities do not possess general powers of removal, and that they cannot remove a treasurer elected by the people, except for causes specified in the statute; but it may be observed that a county treasurer is not a corporate officer. *Clark v. The People*, 15 Ill. 213, 1853.

³ *State v. Jersey City*, 1 Dutch. (N. J.) 536, 1856.

authorized the council "to dismiss the marshal for malpractice in office, or neglect of duty;" and it was held that the council could not remove this officer for the crime of gambling, as this was neither malpractice in office, nor official neglect, within the meaning of the charter.¹

§ 185. The power to *expel* a member of the council does not authorize a resolution by it that "the president of the council be directed not to appoint a certain member on any committee, nor call his name, nor allow him to take part in the action of the board," since this would create no vacancy which could be supplied, but would leave the seat occupied, while it silenced the occupant, and left his constituents unrepresented.²

§ 186. The expulsion of a member of the common council does *not disqualify* him from being *re-elected* to the same office, unless it is expressly so provided by the charter, for where the law annexes a disqualification to an offence, it does so in terms. Hence, if a member having been expelled, even for bribery, be re-elected, he cannot be

¹ Mayor v. Shaw, &c., 16 Ga. 172, 1854.

Whether the council possesses the power *punish for contempt* depends upon the provisions of the charter. The power must, as the author conceives, be conferred either expressly or as incidental to some power which is conferred, or it will not exist. In Doyle v. Falconer, 1 Privy Council Appeals, 329, it was held that the colonial parliament of Dominica had not the inherent privilege of parliament *as a court*, and could not therefore punish for contempt; but in the later case of The Speaker v. Glass, 3 *Ib.* 560, it was decided that the delegation of legislative authority to the Victoria parliament was broad enough to include this power. These cases afford very interesting illustrations of the nature of the power to punish for contempt. Power of courts of the United States to punish for contempt. Burr's Trial, 355; U. S. v. Hudson, 7 Cranch, 32. *Ex parte Kearney*, 7 Wheat. 38. Power of Congress, 11 U. S. Stats. at Large, 155; 12 *Ib.* 333.

² State v. Jersey City, 1 Dutch. (N. J.) 536, 1856. See State v. Chamber of Commerce, 20 Wis. 72. Whether, pending proceedings to expel, a member can be *suspended* from his duties, was a question not determined in the case; but in the State, &c. v. Lingo, 26 Mo. 496, 1858, it was held that the power to provide for *removing* from office corporate officers gives the power to *suspend* from office during the investigation of the charges for which the suspension was made. The court say, "The power to remove necessarily includes the minor power to suspend." *Ib.* 499.

expelled a second time for the same identical act for which he had before been expelled.'

§ 187. It was held in a case in Rhode Island that a clerk of a school committee,—an officer created by the school law, and necessary to the organization and legal action of the committee,—may, after an election by the committee, be removed from office by the committee, but only for cause, as the statute gives no express power to remove, and after due notice and opportunity given him to defend himself upon the charges presented.'

§ 188. Where an officer is *appointed during pleasure*, or where *the power of removal is discretionary*, the power to remove may be exercised *without notice or hearing*. But where the appointment is *during good behavior*, or where the removal can only be for certain *specified causes*, the power of removal cannot, as will presently be shown, be exercised, unless there be a charge against the officer, *notice* to him of the accusation, and *a hearing* of the evidence in support of the charges, and an opportunity given to the party of making defence.'

¹ State v. Jersey City, 1 Dutch. (N. J.) 536, 1856. If the common council, without authority, suspend a member from the duties of his office, *mandamus* is a proper remedy to restore him to the exercise of his legal rights. *Ib.* Willc. on Municipal Corporations, 368, pl. 74, 75; *Ib.* 377, pl. 96; 3 Blacks. Com. 110; Rex v. Barker, 2 Burr. 1266; Angell & Ames on Corporations, sec. 702, 706.

² Willard's Appeal, 4 Rh. Is. 595, 597, *per Ames*, C. J., who says, "Such a power with regard to such an officer, unless expressly forbidden by law, is incidental to the committee as necessary to enable it duly to perform its functions." *Ib.* p. 601. It is sufficient cause for the removal of such a clerk, that he refuses to produce papers which belong to the body which elected him, and of which he is simply the custodian, or refuses to keep or amend the records when duly ordered to do so. *Ib.*

³ Field v. Commonwealth, 32 Pa. St. 478, 1859; *Ex parte* Ramshay, 83 Eng. Com. Law, 174, 189, 1852; *Ex parte* Hennen, 13 Pet. (U. S.) 280; Queen v. Governors, &c., 8 Ad. & El. 682; Bagg's Case, 11 Coke, 98 (6); Rex v. Coventry, 1 Ld. Raym. 391; Dr. Gaskin's Case, 8 T. R. 209; Rex v. Oxford, 1 Salk. 428; Rex v. Mayor, &c., 1 Lev. 291; 2 Kyd, 58, 59; Willc. 253, 254; Grant, 244; Rex v. Andover, 1 Ld. Raym. 710; Page v. Hardin, 8 B. Mon. 648; Hoboken v. Gear, 3 Dutch. 265; Madison v. Korbly, 32 Ind. 74, 1869; Stadler v. Detroit. 13 Mich. 346, 1865. As to the *removal*, by the

§ 189. In the leading case of the *King v. Richardson*, the point was decided, as above mentioned, that a corporation, in the absence of an express grant of authority, had the incidental power to make a by-law to remove officers for *just cause*. Lord *Mansfield*, in that case, classified the offences which would justify the exercise of the power; and his judgment therein has been followed both in England and in this country, in cases arising in private corporations not of a pecuniary character. According to Lord *Mansfield*, there are three sorts of offences for which an officer or corporator may be discharged: 1. Such as have *no immediate relation to his office*, but are themselves of so *infamous* a nature as to render the offender unfit to execute any public franchise. 2. Such as are only against his oath and *the duty of his office as a corporator*; and amount to breaches of the tacit condition annexed to his franchise or office. 3. Offences of a *mixed nature*—as being an offence not only against the duty of his office, but also a matter indictable at the common law.¹ In offences of the *first* class

appointing power, of officers, the duration of whose term is not fixed, see *People v. Comptroller, &c.*, 20 Wend. 595; *Commonwealth v. Sutherland*, 3 Serg. & Rawle, 145; *Field v. Girard College*, 54 Pa. St. 233.

It is the law in England, as applied to the old corporations, that causes which *disqualify* the person to be an officer will not authorize the corporation to amove him, but he must be ousted by *quo warranto*. The reason given is, that one so disqualified is not, in law, a corporate officer, and hence, cannot be amoved as such by the corporation. *Rex v. Doncaster*, Say. 40; Buller N. P. 203; *Rex v. Lyme Regis*, Doug. 85; *Symmers v. Regem*, Cowp. 502; Willc. 259, pl. 669; *Id.* 281, pl. 728. And see *Fawcett v. Charles*, 18 Wend. 473, 1835. It has elsewhere been shown, that with us, the councils of municipal corporations are often made judges of the qualifications of their members and officers, and this may modify or change the rule above mentioned, which seems to rest on narrow and technical grounds.

¹ *Rex v. Richardson*, 1 Burr. 517, 538, 1758; followed, *Rex v. Liverpool*, 2 *Id.* 723. So, also, in *Commonwealth v. St. Patrick's (Benevolent) Society*, 2 Binn. 441, 1810; *Commonwealth v. Guardians, &c.*, 6 Serg. & Rawle, 469, 1821. These cases adopt Lord Mansfield's classification, and assert the inherent power of corporations to expel for offences falling within any of the three classes. See, also, *Butch. Benef. Ass.*, 35 Pa. St. 151; 38 *Id.* 278; *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Society, &c. v. Commonwealth*, 52 Pa. St. 125.

The courts may, by *mandamus*, compel a corporation to amove an officer; and the result of the cases on this point is considered to be that where the

the removal can only be made *after* there has been a previous conviction in a court of law ; and an amotion will not be sustained by a subsequent conviction. In offences of the *second* class the corporation may *try*, and if the charge is established, remove, without any previous or other proceeding in the courts.¹ In offences of the *third* class the English judges have differed on the point whether the officer may or may not be removed before a conviction in a court of justice. The principal cases and the result on this point are briefly stated in the note.²

offence of the officer is such that the corporation has the *power* to amove, the court will only compel it to do so where some one is injured by the omission to remove ; but where it is *required* to amove, or the office is declared by the charter or statute to be void if such an act be done or omitted, there the court will compel it to amove, though no one be shown to have been aggrieved. *Rex v. Truro*, 3 Barn. & Ald. 592 ; *Rex v. West Looe*, 5 Dowl. & R. 416 ; *Rex v. Totness*, 1 b. 488 ; Grant on Corp. 243, and note.

¹ *Rex v. Richardson*, *supra*, and cases cited in last note.

² *Rex v. Richardson*, *supra* ; *Commonwealth v. St. Patrick's Society*, *supra*, and cases cited in preceding note.

³ *Rex v. Carlisle*, Fortesc. 200 ; S. C., 11 Mod. 379. In this case the corporation, before conviction, amoved a capital citizen for giving a bribe to a freeman and offering him another to influence his vote at the election for a mayor. The court's judgment was in favor of the right to amove. Although there might have been a previous conviction, yet this being a great offence against the *duty of his office*, the corporation might amove without a conviction. In *Rex v. Derby*, Cas. Temp. Hardw. 155, Lord Hardwicke mistook the above case on this point, and inclined to think there ought to be a previous conviction. And such seemed also to be the inclination of *Holt*, C. J., in *Rex v. Chalke*, Comb. 897, where the removal was before conviction, for criminally razing entries in the corporation books which were at first proper, but the point was not decided. In *Haddock's Case*, T. Rayn. 439, the amotion was for riotously assembling and assaulting several corporators, thereby impeding the business of the corporation. It was considered that the offence was two-fold : one against the duty of his office as a corporator : the other (wholly disconnected) of a riot. And as he might be guilty of one and yet be acquitted the other, the corporation might amove without conviction, and the case is said to be different from that of *Chalke* (*supra*), for there the officer could not have been guilty of the offence at law without at the same time having been guilty of a breach of his duty. The cases decided are considered to favor this view, viz: if the act is criminal and single in its nature, so that a conviction or acquittal in the courts of law will necessarily determine the guilt or inno-

§ 190. Principle and sound policy require that the *implied power of removal* for offences against the corporation be restricted to acts of a serious nature directly affecting the rights and interests of the corporation.¹ Causes for removal have, in some instances, been held sufficient in England which would not, probably, be so regarded in this country. The principal English cases are given in the note. The sufficiency and reasonableness of the cause of removal are questions for the courts.²

cence of the party, there must be a conviction, but otherwise there may be a removal without, or independent of, a conviction. Buller's N. P. 206; Willc. 249, 250, 251, 252; Glover, 331, 338; Grant, 240; 2 Kyd, 88-94, where the prior cases are digested and stated. Lord Mansfield, in *Rex v. Richardson*, 1 Burr. 538, leaves the point untouched. A removal for a riot in the council chamber, without a previous conviction, is said to have been held good. *Rex v. Yates*, Style, cited 8 Mod. 101. See, further, *Earle's Case*, Carth. 173; *Rex v. Wells*, 4 Burr. 1999; *Regina v. Newberry*, 1 Q. B. 751; 2 Bac. Abr. (Bouv. ed.) 476, and cases cited.

¹ *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Butch. B. Ass.*, 35 Pa. St. 151; 38 *Id.* 278; *Society, &c. v. Commonwealth*, 52 Pa. St. 125; *Commonwealth v. Philadelphia Society*, 5 Binn. 486; *State v. Common Council*, 9 Wis. 254; *Mayor, &c. v. Geisel*, 19 Ind. 344; *Same v. Wright*, *Id.* 346.

² *Rex v. Andover*, 3 Salk. 229. *Poverty* of alderman, so that he could not *pay taxes*, sufficient cause for removing him: *Id.*; but not applicable here. But *bankruptcy* insufficient cause of removal of councilman. *Rex v. Liverpool*, 2 Burr. 723; see *Rex v. Chitty*, 5 Ad. & E. 609. *Total desertion of duties* of office sufficient cause. Buller's N. P. 206; *Rex v. Richardson*, 1 Burr. 541. *When absence and non-attendance* upon meetings, and *neglect of duty*, will be sufficient cause. See *Rex v. Richardson*, *supra*; *Rex v. Wells*, 4 Burr. 2004; 1 Hawk. P. C. chap. LXVI. sec. 1, as to official neglect of duty; approved by Lord Mansfield, in case last cited; *Lord Bruce's Case*, 2 Stra. 819, and notes; *Rex v. Ipswich*, 2 Ld. Raym. 1233; S. C., Salk. 443; Buller's N. P. 206, 207; *Lord Hawley's Case*, 1 Vent. 146; *Rex v. Harris*, 1 Barn. & Ad. 936; *Queen v. Mayor, &c. of Pomfret*, 10 Mod. 107; 2 Kyd, 65 *et seq.*, where the older cases are stated. Willc. 255-264; Angell & Ames, sec. 427, giving summary of English cases. Much depends upon the cause of the neglect, and whether the effect is to obstruct or hinder the business of the corporation or officer from being done.

Habitual drunkenness, disqualifying from the performance of duty, is a sufficient cause to remove an alderman or officer charged with magisterial functions. *Rex v. Taylor*, 3 Salk. 231; 1 Rolle, 409; 3 Bulst. 190. But *casual intoxication*, or being drunk by accident, is not a sufficient cause, for the reason (charitably allowed) that this is likely to happen to the best

§ 191. Respecting the *proceedings to amove*, it has already been observed, that they must be had by and before the *authorized body duly assembled*, in conformity with the rules on that subject, which are elsewhere stated.¹

Rex v. Taylor, *supra*, A. D. 1616. *Old age* is insufficient. Bac. Abr. Corp. E. 9; Hazard's Case, 2 Rolle, 11.

Mere threats or attempts, no injury resulting, not sufficient. Bagg's Case, 11 Coke, 93. *Insulting language*, or *libel* upon mayor or officers, held insufficient, on the ground that personal offences are to be punished by law, and not by the corporation. Rex v. Oxford, Palm. 455; Bagg's Case, 11 Coke, 93, 96, 97, 98, 99; Clark's Case, 2 Cro. 506; Buller's N. P. 203; Rex v. Lane, Fortesc. 275; S. C., 11 Mod. 270; Earle's Case, Carth. 174; Willc. 261, pl. 680. See Regina v. Rogers, 2 Ld. Raym. 777; Innes v. Wylie, 1 Carr. & P. 257; Regina v. Treasury, 10 Ad. & E. 374; 2 Perr. & D. 498.

Official misconduct, amounting to misdemeanor, has been before mentioned, and the cases cited. The misconduct must, it seems, specially relate to the execution of the office. Rex v. Wells, 4 Burr. 1999; see Regina v. Newberry, 1 Q. B. 751. If the same person hold *two offices*, misconduct with respect to one will authorize removal from that one, but not from both; but if the offence is against the duties of both, the removal may be from both. Rex v. Chalke, 1 Ld. Raym. 226; S. C. 5 Mod. 257; Rex v. Doncaster, 2 Ld. Raym. 1566; S. C., 1 Barnard. 265; Rex v. Wells, 4 Burr. 1999; Rex v. Harris, 1 B. & Ad. 936. Misemployment of corporate funds in his custody, is not sufficient cause of amotion, though generally it is good cause of suspension from a financial office, for the court will not grant a *mandamus* to restore until the accounts are made up and submitted to the corporation. Rex v. Chalke, 1 Ld. Raym. 266; S. C., 5 Mod. 259; Rex v. London, 2 Term. R. 182; Willc. 262, pl. 685; Angell v. Ames, sec. 428. On principle, it may be suggested that if such a thing as an implied power of amotion exists at all, it should extend to a case where the financial officer of a corporation is misemploying its funds intrusted to his safe-keeping.

¹ Rex v. Taylor, 8 Salk. 231; Rex v. Sandys, 2 Barnard. 802; Taylor v. Gloucester, 1 Roll. 409; S. C., 3 Bulst., 190; Rex v. Chalke, 1 Ld. Raym. 226; 2 Kyd, 57; Grant, 245, 275; Willc. 264; pl. 691; *Ib.* 266; pl. 698. Necessity for vote or corporate act, declaring the removal or expulsion. Commonwealth v. Pennsylvania, &c. Institute, 2 Serg. & Rawle, 141; Commonwealth v. German Society, 15 Pa. St. 251; Stadler v. Detroit, 13 Mich. 346.

Where, by statute, the mayor, recorder, and an alderman were constituted a body to try charges against policemen appointed by the corporation, with power to suspend or remove, the presence of the mayor is essential to the constitution of the legal body, and if one act, in the trial of such a charge, as mayor, who is not such *de jure* [or *de facto*], the order of removal is void. Hadley v. Mayor, &c., 33 N. Y. 603; see *supra*, sec. 182. Special provision of charter construed to give the power of removal to the mayor and council, and not to the council alone. Charles v. Hoboken, 8 Dutch (N. J.) 203.

The proceeding in all cases where the motion is for cause, is adversary or judicial in its character; and if the organic law of the corporation is silent as to the mode of procedure, the substantial principles of the common law as to proceedings affecting private rights must be observed.¹

§ 192. And *first*, the officer is entitled to a *personal notice* of the proceeding against him and of the time when the trial body will meet. It is not necessary that the notice, citation, or summons set out the charges in detail, but it should contain the substantial fact that a proceeding to remove is intended.² The analogies of the ordinary procedure in the courts of the State (in the absence of statute or by-law) may be followed respecting such details as the notice or summons, mode of service, &c. Notice may be *dispensed with*: 1st. By appearance and answer to the charges.³ 2d. By a total desertion of the place,⁴ so that it

¹ State v. Bryce, 7 Ohio, part II. pp. 414, 416, 1836. "This proceeding," (removal of a trustee of the university) "is essentially adversary; the justice of the common law permits no investigation of facts which may be followed by a loss of a right or by the infliction of a penalty, to be conducted *ex parte*." *Ib.*, per Lane, J. Murdock v. Academy, 12 Pick. 244; State v. Trustees, &c., 5 Ind. 77. Charter mode, if prescribed, must be pursued. *Ib.*; Bacher's Case, 20 Pa. St. 425; see People v. Bearfield, 35 Barb. 254; State v. Common Council, 9 Wis. 254; Madison v. Korbly, 32 Ind. 74; Tompert v. Lithgow, 1 Bush (Ky.) 176, 1866.

² Queen v. Saddlers' Co., 10 House of Lords Cases, 404; State v. Bryce, *supra*; Rex v. Richardson, 1 Burr. 540; Rex v. Doncaster, 2 Burr. 738; see 1 B. & Ad. 942; Rex v. Liverpool, 2 Burr. 731; Bagg's Case, 11 Rep. 99 a; Rex v. Wilton, 5 Mod. 259; Exeter v. Glyde, 4 Mod. 37; Rex v. Ipswich, 2 Ld. Raym. 1240; Willc. 264, 265; Innes v. Wylic, 1 C. & K. 257; South P. R. Co., 5 Ind. 165; People v. Benevolent Society, 24 How. Pr. 216; Delacey v. Neuse, &c. Co., 1 Hawks, 274; Commonwealth v. Pennsylvania Benef. Institute, 2 Serg. & Rawle, 141; Society v. Vandyke, 2 Whart. 309.

³ Willc. 264; Rex v. Wilton, 2 Salk. 428; Rex v. Ipswich, 2 Ld. Raym. 1240; Rex v. Feversham, 8 Term R. 356; Rex v. Carmathen, 1 Maule & Sel. 697; S. P. Commonwealth v. Pennsylvania Benef. Institute, 2 Serg. & Rawle, 141.

⁴ Willc. 265, 266; Grant, 245; Rex v. Harris, 1 B. & Ad. 936; Rex v. Shrewsbury, Cases Temp. Hardw. 151; 7 Mod. 202; Rex v. Toneboy, 2 Ld. Raym. 1275; 11 Mod. 75; Rex v. Grimes, 5 Burr. 2601; Rex v. Leicester, 4 Burr. 2089.

is not practicable to give the notice, as where the officer has permanently, not temporarily, left the municipality and resides constantly elsewhere with his family. Though he may have been absent or left the borough, yet if he return and be in the place at the time of the amotion, he is entitled to notice.¹ If the amotion be for good cause, such as conviction of an infamous crime,² or the repeated declaration of the officer that he would not discharge the duties of his office,³ while it would be more regular to give the notice, yet its omission will not entitle him to a *mandamus* to be restored; for if restored he could be amoved again, and the courts will not order a restoration where they can see that there is good ground of removal, and that the order to restore would be without practical and useful effect.⁴ With these exceptions, the party is entitled to notice of the intention to amove, so that he may have full and fair opportunity to be heard in his defence.

§ 193. There must be a *charge*, or charges, against him, *specifically stated*, with substantial certainty; yet the technical nicety required in indictments is not necessary.⁵ And *reasonable time and opportunity* must be given to answer the charges and to produce his testimony; and he is also entitled to be heard and defended by counsel, and to cross-examine the witnesses, and to except to the proofs against him.⁶ If the charge be not denied, still it must, if

¹ *Rex v. Leicester*, 4 Burr. 2089.

² *Angell & Ames Corp.* sec. 422, where this opinion is expressed; *Grant*, 265; *Rex v. Chalke*, 1 Ld. Raym. 226.

³ *Rex v. Axbridge*, Cowp. 523; see 2 Term R. 182; *Grant Corp.* 245.

⁴ *Rex v. Griffiths*, 3 B. & Ald. 785; see *Blagrove's Case*, 2 Sid. 6, 49, 72; *Rex v. Rowe*, 1 Show. 188; S. C., Carth. 199; *Grant, Corp.* 245. If one irregularly amoved for good cause be restored by *mandamus*, he may be again amoved by regular proceedings *de novo*. *Taylor v. Gloucester*, 8 Bulst. 190; *Rex v. Ipswich*, 2 Ld. Raym. 1283. In such case the office is vacated from the time of the second amotion; the proceedings do not relate back to the former irregular amotion. Willc. 269, pl. 707.

⁵ *Tompert v. Lithgow*, 1 Bush (Ky.) 176, 1866; *Rex v. Lyme Regis* Doug. 174; *Bagg's Case*, 11 Co. 99 a; S. C., 1 Roll. 225; *Glover*, 384; Willc. 267.

⁶ *State v. Bryce*, 7 Ohio, part II. p. 414, 1836; *Rex v. Richardson*, 1 Burr. 540; *Rex v. Liverpool*, 2 Burr. 734; *Murdock v. Academy*, 12 Pick. 244;

not admitted, be examined and proved.' Where the specific charge stated is insufficient to justify the removal, or where the removal is erroneous and no good and sufficient ground therefor appears, the officer is entitled to a *mandamus to restore him*.' But where the proceedings are in conformity with the charter, and are regular, the sentence will not be inquired into collaterally, nor its merits examined by *mandamus* or action.'

§ 194. If the amotion be *legal and authorized*, the office becomes *ipso facto vacant* from the time the amotion is declared, and another person may be elected or appointed to fill it. If the removed officer afterward continues to act he is a mere usurper, and may be ousted on *quo warranto* and punished. Amotion from one office does not, of course, affect the party's title to another.'

where the requisites of a valid proceeding to amove are stated. *Rex v. Chalke*, 1 Ld. Raym. 226; *Rex v. Derby*, Cas. Temp. Hardw. 154.

¹ *Rex v. Feversham*, 8 Term R. 356; *Harman v. Tappenden*, 1 East, 562; Willc. 267; *Glover*, 334; *Murdock v. Academy*, 12 Pick. 244. A municipal officer, when removed by the corporation appointing him, is entitled to actual notice of his removal, and to compensation until he receives such notice. *Jarvis v. Mayor, &c. of New York*, 2 N. Y. Leg. Obs. 396.

² *Rex v. Ipswich*, 2 Ld. Raym. 1240; *Madison v. Korbly*, 32 Ind. 74, 1869; *Commonwealth v. German Society*, 15 Pa. St. 251, 1850; *State v. Jersey City*, 1 Dutch. (N. J.) 536. The restoration puts him in the same situation that he was before the attempted removal. Willc. 269; *post*, sec. 683.

³ *Society, &c. v. Commonwealth*, 52 Pa. St. 125, 1866; *People v. Bearfield*, 35 Barb. 254. Though the amotion be illegal, the officers who took part in it are not *personally liable*, unless both malice and want of probable cause be shown. *Harmen v. Tappenden*, 3 Espin, 278; S. C., 1 East, 555; *Ferguson v. Earl of Kinnoul*, 9 Cl. & F. 289.

Jurisdiction as to the *election* and *amotion* of officers in corporations, when not changed by statute, belongs to the Common Law Courts and not to Equity. *Attorney General v. Earl Clarendon*, 17 Ves. 491; *Dyer*, 332; *Cochran v. McCleary*, 22 Iowa, 75. *Ante*, sec. 141. *Post*, sec. 213.

⁴ *Jay's Case*, 1 Vent. 362; *Symmers v. Regem, Cowp.* 503; Willc. 268, pl. 704; *Rex v. Doncaster*, 2 Ld. Raym. 1566; 1 Barnard. 265; *Rex v. Chalke*, 1 Ld. Raym. 226. Mr. Willcock, 267, pl. 704, whose language is adopted by *Glover* (Corp. 334), states that, if a person legally amoved continues to act, he is a mere usurper, and that "all corporate acts in which he has concurred are equally void, as though he had never been elected or admitted." But if he is permitted to act after amotion, it would probably

be considered, in this country, that his acts would, as to third persons, be valid, like those of an officer *de facto*. If the removal be unauthorized, Mr. Willcock states the rule to be, "that all corporate acts in which he has concurred between the moment of his removal and restitution are of equal validity as if he had never been amoved," &c. Willc. 269, pl. 707. If he was regularly present and concurred, it can well be seen how this should be so; but his concurrence when not regularly acting, or when a *de facto* successor has taken his place and is acting, would not seem to alter the legal quality of the act. In this country the acts of *de facto* officers are everywhere considered valid as respects the public. *Post*, secs. 214, 716, note; *Cushing v. Frankfort*, 57 Maine, 541.

CHAPTER X.

CORPORATE MEETINGS.

§ 195. The subject of Corporate Meetings will be considered under the following general heads :—

1. Common Law Requisites of a Valid Corporate Meeting—secs. 196–199.

2. Notice of Corporate Meetings at Common Law and Under the English Municipal Corporations Act—secs. 200–203.

3. New England Town Meetings ; Requisites of Notice and Power of Adjournment—secs. 204–207.

4. Constitution and Meetings of Councils, or of Select Governing Bodies, and herein of Quorums and Majorities ; Of Integral Parts ; and of Stated, Special, and Adjourned Meetings—secs. 208–225.

5. Mode of Proceeding when Convened—secs. 226–230.

Common Law Requisites of a Valid Corporate Meeting.

§ 196. As respects their mode of action, municipal corporations in this country are of *two general classes*. In the one, as in the organization of *towns* in the New England states, heretofore adverted to, all of the qualified inhabitants meet, act, and vote, *in person*.¹ In the other, which is the kind that prevails generally throughout the states, and even in many of the larger places in New England, the affairs of the town or city are administered by a *select or representative body*, usually denominated the Council, and which is elected by the qualified voters of the incorporated place, not assembled together in a meeting, but at an election, where each elector votes separately and by ballot.²

§ 197. The latter class of corporations are properly municipal. The former class are not so strictly municipal

¹ *Ante*, chap. II. sec. 11.

² *Ante*, chap. II. sec. 11 *et seq.*; *ante*, chap. IV.

as they are public in their character.¹ Where there is a *council* or *governing body*, the inhabitants or voters, in their natural capacity, have no power to act for or bind the corporation, but the corporation must act, and can be bound only, through the medium of this body. Therefore, authorized acts done by the council are not their acts, but those of the corporation. The council is a body which is constantly changing; it is simply the agent of the corporation. But its members, it has been well observed, are not only not *the* municipal corporation, but are not even *a* corporation.² Whether the corporation be of the one class or the other, *its affairs must be transacted at a corporate meeting*, in the one case of the qualified inhabitants, and in the other of the members of the council or governing body, duly convened at the proper time and place, and upon due notice in cases where notice is requisite.³

§ 198. In England, prior to the General Municipal Corporations Act of 1835,⁴ the *requisites of a valid corporate meeting* depended upon the constitution of the particular corporation under its charter or prescriptive usage. To constitute a *corporate assembly* there must, *at common law*, be present, the mayor or other head officer (he being considered an *integral part* of the corporation,⁵ in whose absence no valid corporate act could be done), a *majority* of the members of each select or definite class (these classes being also considered integral parts), and *some members* of the indefinite body (indefinite in point of numbers) usually styled the commonalty, and of each of the indefinite classes if there were more than one.⁶ If there were no indefinite

¹ *Ante*, chap. I. sec. 9; *ante*, chap. II. secs. 10, 10 a, and note.

² *Regina v. Paramore*, 10 Ad. & El. 286; see *Regina v. York*, 2 Queen's B. 850; *Mayor v. Simpson*, 8 Queen's B. 73. *Ante*, sec. 19.

³ *Dey v. Jersey City*, 19 N. J. Eq. 412, 1869; *Baltimore v. Poultney*, 25 Md. 18, 1866.

⁴ *Ante*, chap. III. sec. 16 *et seq.*

⁵ *Ante*, chap. III. sec. 16. Further as to mayor, see *ante*, chap. IX. relating to Municipal Elections and Officers, sec. 147.

⁶ Willc. 52, 53, 66; *Rex v. Atkyns*, 3 Mod. 28; 1 Rol. Ab. 514; *Rex v. Carter*, Cowp. 59; *Rex v. Smart*, 4 Burr. 2143; *Rex v. Gaborian*, 11 East

class, and the governing body consisted of a select or definite class, the common law requisite of a valid corporate assembly is, that a majority of the select class must be present, and if there was more than one such class, then a majority of each of the select classes of which the corporation is constituted; and the presence of the mayor at a select assembly of this kind is not necessary, unless it is expressly required.' But where a common council exists (which, in contemplation of the ancient law, is a meeting of the body at large, or those of them who thought proper to attend, or were considered by their fellow freemen the men best fitted to attend), though such council has become a select or definite class, there the presence of the mayor or head presiding officer is necessary to a valid assembly, though such presence be not required by the charter.'

§ 199. *A majority of each definite part* means a majority of the number of members of which that part consists, not merely a majority of the existing members of the part; but if the act is to be done by an indefinite body alone, it is valid if done at a meeting duly convened, although but a small fraction of the whole body at large be present. But while the presence of a majority of each definite integral part was necessary to a valid corporate meeting, yet it is settled law that a majority of those present, when legally assembled, will bind the rest.' Not

87, note; *Rex v. Morris*, 4 East, 26; *Rex v. Bellringer*, 4 Term R. 823; *Rex v. Miller*, 6 *Ib.* 278; *Rex v. Varls*, Cowp. 250; *Rex v. Monday*, *Ib.* 539.

¹ See authorities cited in the last note.

² Willc. 67.

³ *Rex v. Bellringer*, 4 Term R. 810, 1792, and cases cited; *Rex v. Miller*, 6 *Ib.* 268; *Rex v. Monday*, Cowp. 521, 588; *Rex v. Devonshire*, 1 Barn. & Cress. 609; *Rex v. Bower*, *Ib.* 492; *Rex v. May*, 4 B. & Ad. 843; *Rex v. Headley*, 7 Barn. & Cress. 496; Willc. 216, pl. 546; *Blacket v. Blizard*, 9 Barn. & Cress. 851; *Ex parte Rogers*, 7 Cow. 526, 1827; *Ib.* note a, 764; *Ex parte Willcocks*, 7 Cow. 402, and note 462, 463, 1827; *Young v. Buckingham*, 5 Ohio, 485, 489, 1832; *Buell v. Buckingham*, 16 Iowa, 284, 1864, and cases cited; *State v. Deliesseline*, 1 McCord (South Car.) 52, 1821; *State v. Huggins*, Harper (South Car.), 94, 1824; *Baker v. Young*, 12 Gratt. (Va.), 803, 1855, approving Willc. 216, pl. 546; *Labourdette v. Municipality*, 2 La. An. 527, 1847; *Kingsbury v. School District*, 21 Met. 99, 1846; *Damon v. Granby*, 2 Pick. 845, 855, 1824; *Coles v. Trustees, &c. of Williamsburg*, 10 Wend. 658, 1833; 2 Kent Com. 293; *Angell & Ames Corp.* sec. 501.

only did the law of the old corporations in England require the presence of a majority of the members of each definite integral part, but it went to the extreme length of holding that where the presence of the mayor was necessary, he must be the *legal* mayor, and if he be merely an officer *de facto*, and afterwards be ousted on *quo warranto*, all corporate acts done under the sanction of his office are voidable.¹ By reason of the change in the constitution of municipal corporations in England, wrought by the Corporations Act of 1835, many of the rules respecting corporate meetings are no longer applicable, though, as we shall see, some of them still are. Under that statute the corporation acts, and can only act, through the council; and it is provided that all questions shall be decided by a majority of all the councillors present, including questions of adjournment; that one-third part of the number of the whole council shall be a quorum; that the mayor, if present, shall preside, and if absent, that a presiding officer shall be chosen, who shall have a second or casting vote.²

Notice of Corporate Meetings at Common Law, and under the English Municipal Corporations Act.

§ 200. Due notice of the time and place of a corporate meeting is, by the English law, essential to its validity, or its power to do any act which shall bind the corporation. Respecting notice, the courts in England adopted certain rules, which, since they form the basis of much of the statute law in this country upon the subject, and have, in the main, been followed by our courts, and are founded on reason, may advantageously be here mentioned. All corporators are presumed to know of the days appointed by the charter, statute, usage, or by-laws, for the transaction of particular business, and hence, no notice of such meeting for the transaction of *such* business is necessary, or for the transaction of the mere ordinary affairs of the corporation on such days, yet if it is intended to proceed to any

¹ *Rex v. Carter*, Cowp. 59; *Rex v. Hebden*, Anstr. 391; *Rex v. Dawes*, 4 Burr. 2279; Willc. 54, 55.

² 5 and 6 Will. IV. chap. LXXVI. sec. 69. Rawlinson on Corp. (5th ed.) 136. *Ante*, chap. III. secs. 16, 17.

other act of importance, a notice is necessary, the same as at any other time.

§ 201. A notice, when necessary, must, if practicable, be given to *every member* who has a right to vote, where the act is one to be done by a body consisting of a definite class or classes, and it must be given by, or *issued by order* of, some one who has the authority to convene a corporate meeting. But notice may be altogether *dispensed with*, or its necessity *waived*, by the presence and consent of *every one* of those entitled to it. It must be *served* personally upon *every* resident member, or left at his house. If temporarily absent, it may be left with his family, or at his house or last place of abode. An order to serve all is not sufficient; all, if practicable, must be served, but if the party entitled to notice has entirely quit the municipality, and has no family or house within its limits, notice is not necessary. It must be served a *reasonable time before* the hour of meeting, of which the court will judge from all the circumstances, including usage.

§ 202. The notice must state *the time* of meeting, and the *place*, if it be not the usual place. It is not necessary to state what business is to be done when the meeting relates only to the ordinary affairs of the corporation; but when it is for the purpose of electing or removing officers, passing ordinances, and the like, the fact should be stated, so that members may know that something more than the usual routine of business will be transacted. Such great importance is attached to notice, that it can only be waived by universal consent; but if every member of a select body be present at a regular or stated meeting, or at a special meeting, they may, if *every one* consents, but not otherwise, transact any business, ordinary, or extraordinary, though no notice was given, or an insufficient notice, but the unanimity of consent should plainly appear from their recorded declaration, acts, or conduct. This unanimity is only necessary to enter upon the business; once commenced, the usual rules which govern the body and its actions apply. It is to be observed that the foregoing rules are not applicable where they are in conflict with the

charter, and hence, if this requires a *special notice*, it cannot be waived, even by consent of all. The guildhall is the proper place for the meeting; if there be none, the meeting should be at the usual place; and if at any other place, it should be stated, to prevent fraud or surprise. Acts done at an unusual place will be closely scrutinized.¹

§ 203. By the English Municipal Corporations Act,² the subject of meetings, stated and special, and the notice and summons required are made matter of express regulation. It provides for every borough or city four quarterly meetings of the council in each year, to be held at a fixed date. No *notice of the business to be transacted* at these quarterly meetings is necessary; but three days' *notice*, by posting on or near the town hall, is required of the time and place of every intended meeting. Power is given to the mayor to call special meetings, or, on his refusal, to five members of the council, in which case, the notice on or near the town hall shall state therein the business proposed to be transacted at such meeting, and in every case a summons (in addition to the notice) must be left at the usual place of abode of every member of the council, or at the premises occupied by him, in respect of which he is enrolled as a burgess, at least three clear days before the meeting, and no business can be transacted not specified in the summons. Power to adjourn meetings is expressly conferred upon the council by the same section.³

¹ Authorities in support of the last and two preceding sections of the text: Willc. chap. I. sec. 42, *et seq.* *Rex v. Hill*, 4 B. & C. 441; *Rex v. Liverpool*, 2 Burr. 734; *Rex v. Doncaster*, *Id.* 744; *Rex v. Theodorick*, 8 East, 545; *Rex v. May*, 5 Burr. 2682; *Rex v. Oxford*, Palm. 453; *Rex v. Grimes*, 5 Burr. 2601; *Kynaston v. Shrewsbury*, 2 Stra. 1051; *Musgrove v. Nevison*, 1 Stra. 584; S. C., 2 Ld. Raym. 1359; *Rex v. Mayor of Shrewsbury*, Cases Temp. Hardw. 147; *Smith v. Darley*, 2 House of Lords Cases, 789; *Grant on Corp.* 154-156; *Glover on Corp.* chap. VIII. pp. 146-173. Formerly, the rule that where notice was necessary every member must be notified, was applied only to the case of definite bodies, but it has more recently been declared to be applicable, both to select and indefinite bodies of public corporations. *Rex v. Langhorne*, 4 Ad. & El. 538. See, also, *Rex v. Faversham*, 8 Term R. 356, *per* Ld. Kenyon, *arguendo*.

² 5 and 6 Will. IV. chap. LXXVI. sec. 69. *Ante*, secs. 16, 17.

³ In construing this statute, it has been held that where the meeting is

New England Town Meetings—Notice and Adjournment.

§ 204. In *New England* the inhabitants are required to be notified or warned of *town meetings*. The requisites of such notice, and manner of giving it, are prescribed by statute. The provision is quite general, that the articles or *matters to be acted upon shall be specified* or inserted in the notice or warrant. The courts in those states concur in requiring the statute as to notice to be faithfully observed by the officers charged with the duty of calling meetings. Meetings, to be valid, must be warned or notified according to law. The rule of the English courts applied to indefinite corporate bodies, that if all are present notice may, by unanimous consent, be waived,¹ is not regarded as applicable to the town meetings of New England, and hence a *de facto* meeting, not duly notified, though attended by all the voters capable of attending, is not a valid meeting, and its acts are void.²

an adjourned quarterly meeting, notice is necessary as to any business which was not actually entered upon at the general or regularly quarterly meeting, but not otherwise; and hence, a coroner cannot be elected at such an adjourned quarterly meeting without the notice and summons which the statute requires. *Regina v. Grimshaw*, 10 Queen's Bench, 747, 755. See *Regina v. Thomas*, 8 Ad. & El. 188; *Rex v. Harris*, 1 B. & Ad. 936. As to notice. *Town Council, &c. v. Court*, 1 E. & E. 770; *Regina v. Whipp*, 4 Queen's Bench, 141.

¹ *Rex v. Theodorick*, 8 East, 545; *ante*, sec. 11.

² *Hayward v. School District*, 2 Cush. 419, 1848; *Moor v. Newfield*, 4 Greenl. (Maine) 44, 1826; *School District v. Atherton*, 12 Met. 105, 1846; *Little v. Merrill*, 10 Pick. 543; *Perry v. Dover*, 12 Pick. 206; *Reynold v. New Salem*, 6 Met. 340; *Congregational Society v. Sperry*, 16 Conn. 200; *Rand v. Wilder*, 11 Cush. 294, 1853; *Stone v. School District*, 8 Cush. 592; *Brewster v. Hyde*, 7 N. H. 206; *Northwood v. Barrington*, 9 N. H. 369; *Giles v. School District*, 11 Fost. 304; *Lander v. School District*, 33 Maine, 239, 1851; *Jordan v. School District*, 38 Maine, 164, 1854. So in Vermont it has been decided that it cannot be shown, by parol, to validate the *levy of tax* by a meeting not legally warned, that *all of the legal voters* of the district were present at the meeting. *Sherwin v. Bugbee*, 17 Vt. 337, 1845; distinguished by the court from *Rex v. Theodorick*, 8 East, 543. And see, also, *Hunt v. School District*, 14 Vt. 300; *Pratt v. Swanton*, 15 Vt. 147. Requisites of notice and sufficiency. *Wyley v. Wilson*, 44 Vt. 404, 1872. A *tax* voted at a meeting not legally warned is illegal, and may be recovered back if the party did not pay it voluntarily. *Rideout v. School District*, 1

§ 205. It is, however, sufficient if the *purpose or object* of the meeting *can fairly be understood* from the notice or warrant.¹ And where the statute requires the *time and place* to be stated in the notice, its requirements must be observed, and there can be no legal meeting unless it originally assembles at the prescribed time and place. The law is

Allen (Mass.) 232, 1861. So it may be recovered back if the assessment is *void*. Gerry v. Stoneham, 1 Allen (Mass.) 319, 1861; Tobey v. Wareham, 2 Allen (Mass.) 594. *Post*, sec. 751. See Massachusetts act of 1859, chap. CXVIII. limiting, in such cases, the plaintiff's right of recovery to illegal *excess* of taxation.

Authority to the clerk to call and warn "the annual meetings," does not authorize him to call and warn special meetings; and the acts and doings of a special meeting thus called are wholly void. School District v. Atherton, 12 Met. 105, 1846. And authority "to warn" future meetings does not authorize him "to call" such meetings. Stone v. School District, 8 Cush. 592, 1851.

As to *proof of notice*, and the return of the person or officer making the warning, and what it shall show, see State v. Williams, 25 Maine, 564, 1846, and the Massachusetts and Maine decisions therein cited and commented on; Christ's Church v. Woodward, 21 Maine (13 Shep.) 172, 1846; Fossett v. Bearce, 29 Maine, 523, 1849; Bearce v. Fossett, 34 Maine, 575, 1852; Jordan v. School District, 38 Maine, 164, 1854; Perry v. Dover, 12 Pick. 206; Houghton v. Davenport, 23 Pick. 235; Williams v. Lunenberg, 21 Pick. 75; Briggs v. Murdock, 13 Pick. 305; Rand v. Wilder, 11 Cush. 294, 1853; Cardigan v. Page, 6 N. H. 182; State v. Donahay, 1 Vroom (N. J.) 404; Hardcastle v. The State, 3 Dutch. (N. J.) 352. In Sherwin v. Bugbec, 17 Vt. 337, the strict view is held that the *notice* or warning *must be recorded* by the clerk. If, as recorded, the *time* for which the meeting was to be holden is not specified, the defect cannot be supplied by parol evidence that in the original warning the hour for the meeting was named. This decision was not put upon the ground that the statute expressly required the warning to be recorded (which it did not), but upon the ground that the statute intended that the records should furnish all the means for testing the validity of the proceedings. See, also, Stevens v. Society, &c., 12 Vt. 688, 1839. *Post*, sec. 246. Presumption in favor of legality of meeting after lapse of long time. Peterborough v. Lancaster, 14 N. H. 382, 392. Length of notice. Hunt v. School District, 14 Vt. 300; Pratt v. Swanton, 15 *Ib.* 247.

Under a statute of New York, the notice it required of school meetings held to be *directory* only, and the want of notice, when not fraudulently or willfully omitted, does not render the meeting invalid, and its proceedings void. Marchant v. Langworthy, 6 Hill (N. Y.) 646; affirmed in error, 3 Denio, 526. See, also, Williams v. Larkin, 3 Denio, 114. *Ante*, sec. 229.

¹ School District v. Blakeslee, 13 Conn. 227.

strictly held as to the important particulars of time and place, as will appear by the illustrations in the notes.'

§ 206. Where the statute requires the notice "*to specify the business to be done*," an omission to comply with this requirement makes the meeting void, and it is held that a notice stating, generally, "to do any proper business," is insufficient, and the acts and votes of a meeting held under it are of no binding or legal force.' Indeed, the rule is general that where the statute requires the business to be stated in the warrant or notice, this is absolutely essential, and the meeting must be confined to those matters.'

¹ *Sherwin v. Bugbee*, 16 Vt. 439, 444, 1844. In reference to town meetings, the statute of Vermont requires that the notice shall be in writing, and shall "specify the business to be done, and the *time and place* of holding said meeting." Referring to this statute, *Redfield, J.* (in *Sherwin v. Bugbee, supra*), says: "We have no doubt *the place* of holding the meeting must be definitely specified. It would hardly do to warn a meeting to be held at *some* place in the district, or at a designated village, or at one of two or more dwelling houses. So, too, in regard to *time*, there seems to be a propriety in having it definitely fixed. If the day, only, is named, the question immediately arises, shall the inhabitants be required to attend the whole day? or, when can the meeting transact the business for which they meet, so as to bind the absent members? The fact that the meeting adjourned to another day and hour, will not help the matter, on the obvious principle that the adjourned meeting could have no more authority than the original meeting, which was void."

Where it appears that a meeting was held on the day appointed, it will be presumed that it was held at a suitable time in the day, and pursuant to the notice. A meeting should be opened within a reasonable time after the hour specified; but what is such reasonable time, depends upon circumstances. *School District v. Blakeslee*, 13 Conn. 227. Where a meeting was called *at* a certain school house, it was held to mean within the walls of the building. An assemblage of some of the citizens in the highway *near* the school house, and an adjournment to another place, is not a legal meeting, and its transactions are not binding, though the school house was locked, and the weather cold and no fire in the building. *Chamberlain v. Dover*, 13 Maine, 466, 1836. See, also, *Haines v. School District*, 41 Maine, 246, 1856; *Kingsbury v. School District*, 12 Met. 99, 1846.

² *Hunt v. School District*, 14 Vt. 300, 1842; *Sherwin v. Bugbee*, 16 Vt. 439; S. C., 17 *Ib.* 337, 444, 1844. "Such meetings are void for all purposes of transacting business not specified" in the written notice required by the statute. *Ib. per Redfield, J.*

³ *Ib.* *Johnson v. Wilson*, 2 N. Y. 202; *Tucker v. Aiken*, 7 N. H. 113; *Baker v. Shepherd*, 4 Fost. 208.

By-laws passed at a town meeting not duly warned (as, for example,

§ 207. At a meeting duly constituted and organized, a majority of the members, electors or corporators present, in the absence of any statute either conferring or denying the power, have the implied incidental corporate right *to adjourn* the meeting to another time, either on the same or to a future day, and, if fairly done, to another place within the corporate limits.¹

where the notice did not "specify the objects" of the meeting as required by statute), are void. *Hayden v. Noyes*, 5 Conn. 391, 1824; *Willard v. Killingworth*, 8 *Ib.* 247. The party claiming under a by-law must show it was passed at a meeting duly warned. 8 Conn. 247, *supra*. And must, perhaps, show all the essentials of its validity, such as the due passage, publication, &c. *Ib.*

Where the statute requires that all matters to be acted upon at the meeting shall be inserted in the warrant or notice, a failure to do this will avoid as to both parties any contract that may be made, or any act that may be done, with respect to a matter not embraced in the warrant or notice. *Cornish v. Pease*, 18 Maine (1 Appl.) 184, 1841; *Spear v. Robinson*, 29 Maine (16 Shep.) 531, 1849; *Little v. Merrill*, 10 Pick. 643; *Blackburn v. Walpole*, 9 Pick. 97; *Torrey v. Millbury*, 21 Pick. 64; *Ib.* 75; *Hasdell v. Hancock*, 8 Gray, 526; *Jones v. Andover*, 9 Pick. 146, 1829; *Kingsbury v. School District*, 12 Met. 99, 1846; *Rand v. Wilder*, 12 Cush. 294, 1853. But if the matter is embraced, and the meeting duly met, it is no objection to its action that it was had near the close of the meeting, and when a portion of the voters had retired. *Dean v. Jay*, 23 Maine (10 Shep.) 117, 1843. Subsequent legal meeting may *ratify* acts of previous meeting not duly notified. *Jordan v. School District*, 38 Maine, 164. By participating in a meeting illegally called, a party is not estopped to deny its legality. *School District v. Atherton*, 12 Met. 105.

¹ *Chamberlain v. Dover*, 18 Maine (1 Shep.) 466, 1836; *People v. Martin*, 1 Seld. (N. Y.) 22, 1851; *Hubbard v. Winsor*, 15 Mich. 146; *Kimball v. Marshall*, 44 N. H. 465, 1863; *Goodell v. Baker*, 8 Cowen, 286. Electors exclusive judges of necessity of adjournment of town meeting, and such adjournment to next day, and at another place, in the town twenty miles distant, was considered lawful. *Ib.* The statute provided that if at any annual town meeting no place is fixed by the electors for the next annual town meeting, such town meeting shall be held at the place of the last annual town meeting. 1 R. Sts. N. Y. 340, sec. 8. Held, in *People v. Martin*, 1 Seld. 22, that though the place of meeting was thus contingently fixed by statute, the electors, being duly assembled, might adjourn it for the residue of the day to *another* place in the town. Concluding his opinion in this case, *Paige, J.*, well remarks: "I confess that I have had some difficulty in coming to this conclusion, and I think the power [which is decided to exist] of adjourning a town meeting to another time and place may, under peculiar circumstances, be oppressively exercised, and lead to a defeat of the popu-

Constitution and Meetings of Councils or Select governing bodies; and herein of Quorums and Majorities, of Integral Parts, and of Stated, Special, and Adjourned Meetings.

§ 208. Unlike the towns of New England, in which all the qualified voters meet and act in their primary capacity, the *councils* of cities and towns are representative bodies, the number of whose members is fixed by law, and they are elected by the legal voters of the incorporated place. This council is the governing body of the municipal corporation, and the corporation, unless it is otherwise provided, can act and be bound only through the medium of the council.¹ The charter or constituent act of the place usually contains provisions as to the constitution of the council, its stated and special meetings, and the notice thereof requisite to be given, how many shall constitute a quorum, and an enumeration of its powers. The usual scheme of the organization of the council is to divide the territory of the incorporated place into districts or wards, the voters in each of which elect one or more representatives annually, called aldermen, or councilmen, and these, when duly convened, constitute the council, over which the mayor or head executive officer of the corporation presides, sometimes constituting a member of the council, and in other instances, having power to

lar will. This power ought not to be exercised except in a case of extreme necessity." 1 Seld. 27.

After a valid adjournment, acts by a portion of the voters who remain are invalid. *Kimball v. Lamprey*, 19 N. H. 215. In Massachusetts, an *adjournment* of a meeting should appear *of record*, and parol evidence of an adjournment to another day is held to be inadmissible. *Taylor v. Henry*, 2 Pick. 397, 1824. See *State v. Jersey City*, 1 Dutch. (N. J.) 309, and chapter on Corporate Records and Documents, *post*, sec. 235. The *statute of New York* (1 R. Sts. 342) only requires the town meeting to be kept open during the day time, or some part thereof, but not that it shall be kept open during the whole and every part of the day, between the rising and setting of the sun. *People v. Martin*, 1 Seld. (N. Y.) 22, 1851.

¹ *Central Bridge Corp. v. Lowell*, 15 Gray, 106, 116, 1860, where an act affecting a city was, by its terms, to take effect on acceptance by the city, it was held that the acceptance might be made by the governing body. *Ib.*

vote only when there is a tie, or to give a second vote in case of a tie.¹

§ 209. The doctrine of the English courts as to the old corporations in that country, that the *mayor was an integral part* of the corporation, whose presence, unless otherwise provided in the charter, was necessary to a valid corporate meeting; that during a vacancy in the office of mayor, the corporation could do no valid act, unless expressly empowered, except to elect another, and thus complete the body, and that the acts of the corporation under the presidency of any other than a mayor *de jure*, were voidable, has, it is believed, no application to the office of mayor in the corporations of this country.²

§ 210. The *right of the mayor* or other officer to *preside* over the meeting of the council is a *franchise*, and may be tested by an information in the nature of a *quo warranto*,³

¹ Power to preside and give casting vote at meetings of a religious corporation construed. *People v. Rector, &c.*, 48 Barb. 603.

² *Infra*, sec. 222; *Welch v. Ste. Genevieve*, 1 Dillon C. C. 130, 1871. And see *ante*, chap. IX. as to powers and duties of the mayor, secs. 147, 148.

The presiding officer of a town meeting, with statute authority to maintain order, may make a valid order, though it be by parol only, for the removal of a *disorderly person* who disturbs the business of the meeting. *Parsons v. Brainard*, 17 Wend. 522, 1837. Approval by the *mayor* of *proceedings* of the council may, by special requirement of charter, be essential to their validity. *Graham v. Carondelet*, 38 Mo. 262, 1862; *Kepner v. Commonwealth*, 40 Pa. St. 124. When not. *State v. Jersey City*. 1 Vroom, 93, 148; see *Dey v. Jersey City*, 19 N. J. Eq. 412; *Taylor v. Palmer*, 31 Cal. 241; *State v. Newark*, 1 Dutch. (N. J.) 399; *post*, sec. 265, note.

³ *Cochran v. McCleary*, 22 Iowa, 75, 1867, and authorities there cited; *Reynolds v. Baldwin*, 1 La. An. 162, 1846; *Rex v. Williams*, 1 Burr. 402; Willc. 456, pl. 337; *Rex v. Hertford*, 1 Ld. Raym. 426; approved, *Commonwealth v. Arrison*, 15 Serg. & Rawle, 130. *Ante*, chap. IX. sec. 147. In *Cochran v. McCleary*, *supra*, it was held that the mayor, in cities of the second class, organized under the General Incorporation Act (Rev. of Iowa, 1860, chap. LI.) is not, *ex-officio*, a member of, nor has he any right to preside over, the city council; that the council was composed exclusively of trustees or aldermen, and elected its own presiding officer. The mayor of New York is not a member of the common council, and the common council, having the power by statute to appoint to office, may exercise it without the concurrence of the mayor, who has no veto power upon the appointment. *Achley's Case*, 4 Abb. Pr. Rep. 35, 1856.

but cannot be determined, at least, ordinarily, unless by statute provision, on a bill in chancery to enjoin, or in any other indirect or collateral proceeding.¹

§ 211. Who shall *compose the council* or governing body of the corporation is, in all cases, prescribed by the charter or incorporation act, but the language used has been such as sometimes to lead to controversy.² The organic act of a city provided "that the intendant of police shall have a seat in the board of commissioners [the governing body of a city corporation], and when present, shall preside therein; *in his absence*, the board shall appoint a chairman *pro tempore*." It was held that the intendant was thereby constituted one of the commissioners, and had the right to participate in making ordinances.³ Where the

¹ Cochran v. McCleary, 22 Iowa, 75, 86, 1867; Topping v. Gray, 7 Hill (N. Y.) 259; affirming S. C., 9 Paige, 507; Markle v. Wright, 13 Ind. 548; Hullman v. Honcomp, 5 Ohio, 237; People v. Cook, 4 Seld. 67; affirming S. C., 14 Barb. 257; Mayor v. Conner, 5 Ind. 171; Mosley v. Alston, 1 Phill. 790; Lord v. The Governor, &c., 2 Phill. 740; Peabody v. Flint, 6 Allen (Mass.) 52; Hagner v. Heyberger, 7 Watts & Serg. 104; People v. Carpenter, 24 N. Y. 86; People v. Draper, 15 N. Y. 632; People v. Insurance Company, 2 Johns. Ch. 371; People v. Same Company (*quo warranto*), 15 Johns. 358; Commonwealth v. Bank (*quo warranto*), 28 Pa. 289; in chancery, *Id.* 379; Hughes v. Parker, 20 N. H. 58; *Ex parte* Strahl, 16 Iowa, 369; Updegraff v. Crans, 47 Pa. St. 103; Facey v. Fuller, 23 Mich. 527; see Kerr v. Trego, 47 Pa. St. 292, cited *infra*, sec. 213.

² Cochran v. McCleary, 22 Iowa, 75, 1867.

³ Raleigh v. Sorrell, 1 Jones (North Car.) Law, 49, 1853. In this case the Supreme Court of North Carolina admit (*arguendo*) that an officer—as, for example, the intendant—has no right, under the act of incorporation, to sit with the legislative body of the corporation, but if he does so and acts with them, that an ordinance thus passed will be void, because the powers given to the corporation must be exercised in strict conformity to the special delegation of authority, and because, in the case supposed, the ordinance is not passed by the body to which the power is given; citing Rex v. Croke, Cowp. 26. The view of the court is in accordance with the rule of the English courts as applied to their corporations. Thus, Mr. Willcock says: "It may be unnecessary to add, that whenever a particular business is delegated to a select body, if others join in the performance of it, the act is void; as if the mayor, aldermen, and commonalty join in making a by-law which is directed to be made by the mayor and aldermen. For if others are allowed to vote, a by-law might be established, although all those to whom the power is specifically delegated should be in the minority." Corp.

power to legislate for the corporation is vested in "the mayor and councilmen," the council by itself cannot legislate, but must act in conjunction with the mayor. In deciding the point the court observes: "If a simple resolution [instead of an ordinance] would be sufficient, yet, before it would have any validity, it would necessarily have to be signed by the mayor as a part of the law-making power—the co-ordinate action of both is required."

§ 212. It is undoubtedly true, as already stated, that *the corporate authority must be exercised by the proper body*. Thus, where a town was organized under a charter which vested the corporate powers of the place in a president and six trustees, and subsequently a general incorporation act was passed which was erroneously supposed to apply to the town, and under which the town elected different officers from those provided in the special charter, at a different time and constituting a different body, it was held, in the absence of legislative ratification, that this latter body could not exercise the authority of the corporation, since they were a body without any legal existence, and were not *the* body authorized to act for the corporation. The principle that the acts of *de facto* officers are valid was considered not to be applicable.¹

§ 213. Where there are two bodies, each of which claims to be the regular organized council, and is acting as

68, pl. 128; Parry v. Berry, Comyns, 269; Rex v. Head, 4 Burr. 2521; Hoblyn v. Regem, 6 Bro. P. C. 520; Rex v. Westwood, 4 B. & C. 799, 818; Green v. Durham, 1 Burr. 181. Whether the mere fact that a single unauthorized person is, by a mistaken construction of the charter, allowed to participate in the transaction of a meeting of the council, would, in this country, be held necessarily to avoid them, is a question which, perhaps, remains yet to be settled. It has been held, that if persons who are not qualified vote at a town, parish, or district meeting, without objection or challenge at the time, proof of that fact cannot afterwards be made with a view to invalidate the proceedings. Sutton v. Cole, 8 Pick. 232, 1825. So, if such a meeting is called by persons acting under *color* of authority, it will be legal if no exception to their authority is taken at the time. *Ib.*

¹ Saxton v. Beach, 50 Mo. 488, 1872, *per* Wagner, J.

² Decorah v. Bullis, 25 Iowa, 12, 1868; Welch v. Ste. Genevieve, 1 Dillon C. C. 180, 1871. *Infra*, sec. 214.

such to the detriment of the public, the body rightfully entitled to act may have an *injunction* to restrain the other from interference with them. To the argument, that in relation to public corporations, the attorney general alone can file such a bill, the court replied: "We do not think so. It is right for those to whom public functions are intrusted to see that they are not usurped by others."¹

§ 214. In this country the doctrine is everywhere declared, that the acts of *de facto* officers, as distinguished from the acts of mere usurpers, *are valid*, and the principle extends not only to municipal officers generally, but also to those composing the council, or legislative or governing body of a municipal corporation.² But in order that there may be a *de facto* officer, there must be a *de jure* office; and the notion that there can be a *de facto* office has been characterized as a political solecism, without foundation in reason and without support in law; and, therefore, a person

¹ Kerr v. Trego, 47 Pa. St. 292, 1864, *per* Lowrie, C. J. Mode of organizing councils to which new members are to be admitted, and tests, in case of conflicting councils, for determining which is the legal organization. *Ib.* *Supra*, sec. 148, note; sec. 210; sec. 193, note.

² Scoville v. Cleveland, 1 Ohio St. 126, 1853; Decorah v. Bullis, 25 Iowa, 12, 1868; Cochran v. McCleary, 22 Iowa, 75, 84; *Ex parte* Strahl, 16 Iowa, 360; People v. Stevens, 5 Hill, 616; State v. Jacobs, 17 Ohio, 143; People v. Bartlett, 6 Wend. 422; Pritchard v. People, 1 Gilm. (Ill.) 529; People v. Runkle, 9 Johns. 147; Trustees, &c. v. Hill, 6 Cow. 23; Williams v. School District, 21 Pick. 75; see Rex v. Mayor, &c., 9 Mod. 111; De Grave v. Monmouth, 4 Car. & P. 411; Laver v. McGlachlin, 28 Wis. 364; *post*, sec. 716, note; Cushing v. Frankfort, 57 Maine, 541. In a case in the House of Lords, decided in 1851, it was held, that an act done by a definite body, under authority of parliament, was not invalid because officers *de facto* joined with officers *de jure* in the doing of it. The judges having unanimously declared this to be their opinion, the Lord Chancellor said: "The opinion of the judges as to vestrymen *de facto* and *de jure* was of great importance. When it was considered that there were many persons who were charged with very important duties, and whose title to perform those duties or to exercise the powers necessary for their performance, the public could not easily ascertain at the time, and when it was remembered what inconveniences would arise if the validity of their acts depended on the propriety of the election of the persons who had to perform them, the value of the clear enunciation of the principle thus made by the judges was very great, and in the correctness of it he begged to declare his entire concurrence. Scadding v. Lorant, 5 Eng. Law & Eq. 16, 30, *per* Lord Chancellor Thurlb."

cannot claim to be a *de facto* officer of a municipal corporation when the corporation or people have, in law, no power, in any event, to elect or appoint such an officer.¹

§ 215. The common law principle, that if an act is to be done by an *indefinite body* it is valid, if passed by a majority of those present at a legal meeting, no matter how small a portion they may constitute of the whole number entitled to be present, has been deemed applicable to the towns of New England. In those towns the corporate power resides, as we have seen, in the inhabitants, or citizens at large, and these form the constituent body. If the meeting has been duly called and warned, those who assemble, *though less than a majority of the whole*, have the power to act for and bind the whole, unless it is otherwise provided by law. Those who remain away are justly and conclusively presumed to assent to what may lawfully be done by those who attend.²

§ 216. The common law rules as to *quorums* and

¹ Decorah v. Bullis, 25 Iowa, 15, 18, 1868. Hildreth's Heirs v. McIntire's Devisees, 1 J. J. Marsh. (Ky.) 206; People v. White, 24 Wend. 520, 540, 541; Carleton v. People, 10 Mich. 250; Welch v. Ste. Genevieve, 1 Dillon C. C. 130, 1871; *supra*, sec. 212; *post*, chap. XXI.; *post*, sec. 716.

² Damon v. Granby, 2 Pick. 845, 355, 1824; Commonwealth v. Ipswich, 2 Pick. 70; Williams v. Lunenburg, 21 Pick. 75; Church Case, 5 Robert (N. Y.) 649, 1867; First Parish v. Stearns, 21 Pick. 148, 1838; State v. Binder, 38 Mo. 450, 1866.

At a popular election, a candidate for a municipal office received a *plurality* of all the votes cast, but not a majority. There was no provision of the charter nor any by-law on the subject. The usage in the corporation seemed to have been to consider the person having the highest number of votes, although not a majority of the whole, as duly elected. The statute in relation to *state* elections expressly provided that "plurality, or the highest number of votes, should make a choice." Under these circumstances, the majority of the court were of opinion that the common law rule, that a *majority* is necessary to a valid election, applied, and was not controlled by the terms or spirit of the general election law of the state. State v. Wilmington, 8 Harring. (Del.) 204, 1840. Harrington, J., dissented, holding (and, as it would seem, with reason) that the plurality principle had been the one "invariably adopted as most in consonance with our institutions in all cases where the law of election is silent in this respect." *Ib.* p. 305. See First Parish v. Stearns, 21 Pick. 148. As to *municipal elections*: *Ante*, chap. IX.

majorities, established with reference to corporate bodies, consisting of a *definite number* of corporators, have also, in general, been applied to the common council, or select governing body of our municipal corporations, where the matter is not specially regulated by the charter or statute. Thus, to use Mr. Dane's illustration, if the body consists of twelve common councilmen, seven is the least number that can constitute a valid meeting, though four of the seven may act.¹ Accordingly, a statute in reference to a definite body, declaring that a "*majority of those present at any regular meeting* shall be competent" to transact business, leaves the number which may form a *quorum* to be determined by the common law—that is, there must be at least a majority present, and such a provision, it was considered, did not authorize a *minority of the whole body* to act.²

§ 217. So, if a board of village trustees consists of *five members, and all, or four, are present*, two can do no valid act, even though the others are disqualified, by interest, from voting, and therefore omit or decline to vote; their assenting to the measure voted for by the two will not make it valid. If three only were present they would constitute a quorum, then the votes of two, being a majority of the quorum, would be valid;³ certainly so where the three are all competent to act.⁴

§ 218. In another case, the power of amotion was conferred upon a city council to be exercised "*by a vote of two-thirds of that body*," and this was considered to give the power of removal to two-thirds of a legal quorum. Two-thirds of the whole number of members composing the council were held not to be required. The point was ad-

¹ 5 Dane Abr. 150; *Ex parte Willcocks*, 7 Cow. 402, 410, 1827, note d, and criticism on the rule stated in 1 Kyd on Corp. 418, 425; 2 Kent Com. 293; *Buell v. Buckingham*, 16 Iowa, 284, 1864; *Regents, &c. v. Williams*, 9 Gill & Johns. (Md.) 365; *Mills v. Gleason*, 11 Wis. 470.

² *Ex parte Willcocks*, 7 Cow. 402, 1827; *Ib.* 463, and note; *Ib.* 526, and note.

³ *Coles v. Williamsburg*, 10 Wend. 658, 1833.

⁴ *Buell v. Buckingham*, 16 Iowa, 284, 1864, and cases cited.

mitted to be close, and the French text of the charter was relied on as favoring the conclusion reached.¹

§ 219. In a case which arose in California, the charter of the city contained a provision that no ordinance should be passed by the common council, except by a *majority of all the members elected*. Eight were elected, and it was decided, under the above-mentioned requirement of the charter, that an ordinance could not be passed by a vote of *four* against three, since four did not constitute a majority of all the members elected, although it did constitute a legal quorum.²

§ 220. In the absence of special provision, the *major part of those present*, at a meeting of a select body, *must concur* in order to do any valid act. Therefore, when it appeared that thirteen ballots were cast when the members present were only entitled to give twelve votes, of which seven were for one person and six for another, there is no election, and the council, though it has declared that the person receiving seven votes was duly elected, may subsequently rescind its action and proceed to a new election.³ And in South Carolina the general rule is recognized, and a *majority* of the board of managers of elections—having power, by statute, to determine the validity of contested elections—is a quorum, and a majority of that quorum may act and decide.⁴

§ 221. And, as a *general rule*, it may be stated, tha.

¹ Warnock v. Lafayette, 4 La. An. 419, 1849. See, on this point, Logansport v. Legg, 20 Ind. 815.

² San Francisco v. Hazen, 5 Cal. 169, 1855. See, also, Oakland v. Carpentier, 13 Cal. 540; McCracken v. San Francisco, 16 Cal. 591; Piemental v. San Francisco, 21 Cal. 851.

³ Labourdette v. Municipality, 2 La. An. 527, 1847.

⁴ State v. Deliesseline, 1 McCord (South Car.) 52, 1821, where the subject is elaborately considered by Nott, J.; S. P. State v. Huggins, Harper (South Car.) Law, 94, 1824, further holding that where, of eighteen managers appointed by the legislature, two refused to qualify, one was disqualified, and one dead, the remaining fourteen (from necessity and public convenience) properly constituted the board, and might act by a majority of the fourteen. The decision rests upon the legislative intent, deduced from various provisions of the act, to commit the matter to the *acting* managers.

not only where the corporate power resides in a *select body*, as a city council, but where it has been delegated to a *committee* or to *agents*, then, in the absence of special provisions otherwise, a *minority* of the select body, or of the committee or agents, are powerless to bind the majority or do any valid act. If all the members of the select body or committee, or if all of the agents are assembled, or if *all* have been duly notified, and the minority refuse or neglect to meet with the others, a majority of those present may act, provided those present constitute a majority of the whole number. In other words, in such case, a major part of the whole is necessary to constitute a quorum, and a majority of the quorum may act. If the major part withdraw so as to leave no quorum, the power of the minority to act is, in general, considered to cease.¹ But where the duties are purely ministerial, and not judicial, or are of such a nature as to exclude the idea of action as a body or board, and where they are devolved on *public* officers or agents rather than on the agents of corporations, the rule above stated (as the cases below referred to will show) has been relaxed, and, in some instances, deemed wholly inapplicable.²

¹ *Kingsbury v. School District*, 12 Met. 99, 1846; *Day v. Green*, 4 Cush. 488, 489, 1849; *Fisher v. School District*, 4 Cush. 494, 1849; *Coffin v. Nantucket*, 5 Cush. 269, 1850; 11 Cush. 483; *Damon v. Granby*, 2 Pick. 845, 855, 1824; *State v. Jersey City*, 3 Dutch. (N. J.) 493; *Charles v. Hoboken*, *Ib.* 203; *Dey v. Jersey City*, 19 N. J. Eq. 412, 1869; *Baltimore v. Poultney*, 25 Md. 18, 1866.

² With respect to persons or officers appointed by law to act *judicially* in a *public* matter, it is generally held, there being no provision of statute to the contrary, that where *all meet*, and act, a *majority* may decide and bind the rest, and this notwithstanding the express dissent of the minority, or their wrongful withdrawal before the act is consummated. *Ex parte Rogers*, 7 Cow. 526, 1827 (appraisal of damages by canal appraisers), and see *Ib.* note *a*, and the cases there cited and reviewed; *Ib.* 764, explanation. See, further, *Ex parte Willcocks*, 7 Cow. 402, and note; *Ib.* 462, 463; *Young v. Buckingham*, 5 Ohio, 485, 489, 1832; *Charles v. Hoboken*, 3 Dutch. (N. J.) 203; *Martin v. Lemon*, 26 Conn. 192, 1857; *post*, sec. 757.

The statute authorized the appointment of three levee inspectors, and prescribed their duties, which involved the exercise of judgment. Held, that all must meet and act, and that the action of a majority in the absence of the third was void. *Ballard v. Davis*, 81 Miss. 525, 1856.

Where a *majority of a committee* is authorized to act, they constitute a

§ 222. The doctrine of the English courts is, that all of the *integral parts* of a corporation necessary to do an act

party capable of contracting, and another member of a committee, not acting as such, but as an individual, constitutes another party capable of being contracted with. It is accordingly held, that a *majority* of such a committee may contract with or employ *one of their own number*, and such contract, if fairly made and without fraud or corruption, will be binding upon the corporation. *Junkins v. Union School District*, 39 Maine, 220; *Buell v. Buckingham*, 16 Iowa, 284; *post*, sec. 371 note, sec. 230; *Willard v. Newburyport*, 12 Pick. 227. But a contract made by less than a majority of a committee of the corporation, though in the name of the whole, binds *neither* party. *Post*, sec. 376. But it will be binding if the authority was joint and several, or if ratified. *Adams v. Hill*, 16 Maine (4 Shep.) 215, 1839; *Kupfer v. South Parish, &c.*, 12 Mass. 185, 1815; *Allen v. Cooper*, 22 Maine, 138, 1842. In *Damon v. Granby*, 2 Pick. 345, 1842, this distinction is taken. If a public corporation appoints a committee of its *own members*, a majority may bind, for such is the usage and the common law in relation to corporations. But if the authority is given to persons not members of the body, such persons are agents, and not technically a committee, and all must concur, unless it appear that it was intended that a majority should act. See authorities cited by Solicitor General Davis in same case, p. 350; Viner's Ab. title *Authority*, B. pl. 7. Further as to binding force of the act of majority of a committee or board of selectmen, see *Jones v. Andover*, 9 Pick. 146; *Crommett v. Pearson*, 18 Maine (6 Shep.) 344, 1841; *Junkins v. School District*, 39 Maine, 220, 1855; *Inhabitants, &c. v. Cole*, 3 Pick. 232, 244; *Kingsbury v. School District*, 12 Met. 99, 1846; *Keyes v. Westford*, 17 Pick. 273, 1835; *Green v. Miller*, 6 Johns. 39, 1810; *Grindley v. Barker*, 1 Bos. & Pul. 236, *per Eyre*, C. J.; *King v. Boston*, 3 Term R. 592; *Guthrie v. Armstrong*, 5 Barn. & Ald. 628, 1822, where it was held, that a power given to fifteen jointly and severally was well executed by four. A school committee appointed according to and under a statute are public officers within the meaning of the statute which gives a majority of such officers authority to act for the whole. *Keyser v. School District*, 35 N. H. 477, 1857. Where an authority is given, by law, to a committee, or to more persons than one, to do an act of a public nature, one alone, unless there be something to show such intention, cannot act independently and without the concurrence of the others, or at least of a majority. If the act is *ministerial*, a majority at least must concur; but unless required, or such is the practice, they need not act as a board, and be convened or notified to be convened as such. But if the act is *judicial* in its nature, that is, requiring the exercise of judgment, unless special provision is otherwise made, all must meet or have notice to meet, a majority will constitute a quorum, and a majority of the quorum will be competent to act. *Martin v. Lemon*, 26 Conn. 192, 1857. In this case it was ruled, that one of a committee of three to remove encroachments on highways could act alone. Committees of public corporations have sometimes been held to be governed, with respect to meeting and notice, by different rules from a board which has necessarily to be assembled or convened before it can act.

must not only meet, but remain present till the act is completed; and therefore if one of such parts deserts or withdraws, though wrongfully, and to defeat any action, before the act is consummated, the act is not valid.¹ The liability

And the acts of a majority of such committees have been considered valid, though some member of the committee was not notified. *Gallup v. Tracy*, (town committee to stake out oyster grounds), 25 Conn. 10, 1856. But compare *Martin v. Lemon*, 26 Conn. 192. And see *Damon v. Granby*, 3 Pick. (Mass.) 345, 354; *Grindley v. Barker*, 1 Bos. & Pul. 229; *Keeler v. Frost*, 22 Barb. 400; *Perry v. Tyner*, 1 *b.* 137. Where a public authority is to be exercised by two officers—a number not admitting of a majority—regularly, both should act; yet, to prevent a failure of justice, it seems one may, in certain cases, as where the other is dead, disqualified, or absent, act alone. But certain it is, that where one only acts, the *consent of the other will be presumed*. This is an application of the strong presumption which obtains in favor of the performance of official duty. *Downing v. Rugar*, 21 Wend. 178, 1839, and authorities cited. This case also holds, that the presumption of consent should be rebutted only by the testimony of the *other* officer. *Ib.* 185. “It is a general principle, that where a board of officers (for example, overseers of the poor) is constituted to perform a duty provided by law, the act of the majority is the act of the whole body.” *Per Bennett, J.*, *Wolcott v. Wolcott*, 19 Vt. 37, 39, 1846. See, also, *King v. Beesten*, 8 Term R. 592; *Jones v. Andover*, 9 Pick. 146.

Under the statutes of Pennsylvania, all powers conferred upon county commissioners may be legally executed by two without the concurrence of the third. *Commissioners v. Leckey*, 6 Serg. & Rawle, 166; *Cooper v. Reansbey*, 8 Watts, 128; *Curtis v. Butler Co.*, 24 How. (U. S.) 435. *Jefferson Co. v. Slagle*, 66 Pa. St. 202, where it is held that a contract by two county commissioners within the scope of their authority bound the county, although not made at their office.

Where three commissioners are appointed to contract for site for poor house, two of them cannot make a valid purchase. *Pulaski Co. v. Lincoln*, 4 Eng. (Ark.) 320, 1849. Action of less than a majority of commissioners of public buildings, appointed by act of legislature, is void. *Petrie v. Doe*, 30 Miss. 698, 1856. A statute declaring that every board of township trustees, “and the *members* thereof,” shall be overseers of the poor, was construed to make *each* member an overseer, with power to act. *County Commissioners v. Jones*, 7 Ind. 3, 5, 1855. When majority may lawfully execute powers of a public nature. *Commissioners v. Lecky*, 6 Serg. & Rawle (Pa.), 170; *Baltimore v. Turnpike*, 5 Binn. 484; *McCready v. Guardians*, 9 Serg. & Rawle, 99; *Commonwealth v. Commissioners*, 9 Watts, 466, 471; *Cooper v. Lampeter*, 8 Watts, 128; *Caldwell v. Harrison*, 11 Ala. 755; *Commissioners v. Tarver*, 21 *Ib.* 661; *Crist v. Town Trustees*, 10 Ind. 452; *Schenck v. Peay*, 1 Dillon C. C. R. 267.

¹ *King v. Williams*, 2 Maule & Sel. 141; following *King v. Butler*, 8 East, 388; questioning *King v. Norris*, 1 Barnard. K. B. 385; cited and reviewed

of this rule to abuse, since it enables one of the parts of a joint meeting or assembly to defeat any action whatever, has led the courts in this country to deny its applicability here, or to apply it with caution.¹

7 Cow. 526, note; *King v. Miller*, 7 Term R. 278; 2 Kent's Com. 292. Mr. Willcock vindicates the rule, but on grounds not very satisfactory. Corp. 53, 54. *Supra*, sec. 209.

¹ *Ex parte Humphreys*, 10 Wend. 612, 1834; *People v. Batchelor*, 22 N. Y. 128, 146, *per Denio*, J.; *First Parish v. Stearns*, 21 Pick. 148, 1838; *Coles Co. v. Allison*, 23 Ill. 437.

The common law rule, that to the *due constitution of a corporate assembly* a majority, at least, of each integral or component part or body, must necessarily be present, was departed from by the Supreme Court of New Hampshire in the case of *Beck v. Hanscom*. By the charter, the city government of Portsmouth was vested in a mayor, "one council of seven, to be denominated the board of aldermen, and one council of twenty-one, to be denominated the common council, which boards should, in their joint capacity, be denominated the city council." It was further provided by the charter, that a "majority of each board shall constitute a quorum;" that the two bodies shall sit and act separately, except "when the two are required to meet in convention;" that at the meeting of the "city council in convention, if it shall appear that a majority of either of said bodies is not present," the members may compel the attendance of the absentees, &c. The board of aldermen and the common council separately voted to meet in convention on the 12th of June, for the choice of city officers; but when the time arrived, only a minority (three out of seven) of the board of aldermen appeared. The common council and these aldermen, twenty-three in all, being a majority of both boards, proceeded to elect city officers; and it was held, 1st, that the election was valid; and 2d, that a majority of the twenty-three present could elect. In reference to this decision it may be observed, that the court take no notice of the power of compelling the attendance of the absentees, and that this provision seemed to contemplate the presence of a majority of *each* of the constituent bodies. The court cite and approve *Whitside v. People*, 26 Wend. 634, and *Ex parte Humphreys*, 10 Wend. 612; in both of which, however, the constituent bodies, so to call them, duly met but refused to act. It is substantially admitted by the court, that the decision they make is not in conformity with the English rule, but they consider it to be the one "which will best enable the government of the city to proceed with regularity;" and that "after every preliminary step has been properly taken, the mere neglect of one of the constituent bodies to carry its previous vote into effect ought not to hinder the other bodies from performing the duties required by the charter." *Per Gilchrist*, C. J., in *Beck v. Hanscom*, *supra*, 9 Fost. 218, 226. In *Kimball v. Marshall*, 44 N. H. 465, 1863, *Bell v. Hanscom*, *supra*, is approved, and its doctrine applied to a different state of facts.

Effect of refusal of *one of two distinct bodies* to go into a *joint* meeting,

§ 223. The usual division of the *meetings of corporate bodies* is into (1) *stated* or *regular*, and (2) *special* meetings; and meetings of either class possess an incidental power of *adjournment*, from whence we have another class known as *adjourned meetings*. The time of holding regular or stated meetings is fixed by the charter, or by ordinance or by-law, passed in pursuance thereof, and, in either case, the time thus appointed is presumed to be known to the members of the body; and unless the charter or by-law otherwise provides, it is their duty to attend such meetings without further or special notice. Absent members, equally with those who are present, are bound by whatever is lawfully done at a regular or stated meeting, or any regular and valid adjourned meeting.¹

§ 224. If the meeting be a *special* one, the general rule is, unless modified by the charter or statute, that *notice* is necessary, and must be personally served, if practicable, upon *every member* entitled to be present, so that each one may be afforded an opportunity to participate and vote.²

or, after being assembled in joint meeting, to participate in "the joint ballot" by which officers (by statute) are to be removed or appointed, see, in Court of Errors, *Whitside v. The People*, 26 Wend. 634, 1841, reversing decision of Supreme Court in same case, 23 Wend. 9. See act of congress of July 25, 1866 (14 Statutes at Large, 243), regulating the election of United States senators by the legislatures of the several states in *joint assembly*, containing provisions (the necessity for which has been shown by experience) to prevent one of the bodies from defeating action.

¹ *People v. Batchelor*, 22 N. Y. 128, 1860; *Smith v. Law*, 21 N. Y. 296; *Hudson Co. v. State* (presumption of regularity), 4 Zab. 718; *Insurance Co. v. Sanders*, 86 N. H. 252. See and compare, *State v. Jersey City*, 1 Dutch. (N. J.) 309.

² *People v. Batchelor*, 22 N. Y. 128, 134, *per Selden, J.*; *Ib.* 146, *per Denio, J.*; *Ex parte Rogers*, 7 Cow. 526, and cases cited in valuable note; *Downing v. Rugar*, 21 Wend. 178; *Burgess v. Pue*, 2 Gill (Md.) 254; *Stow v. Wise*, 7 Conn. 214; *Harding v. Vandewater*, 40 Cal. 77; *Smith v. Darley*, 2 House Lords Cases, 789, 1849.

At a stated meeting of a select body at which all the members are not present, it is not competent, in the opinion of the Court of Appeals of New York, in the absence of a statute or by-law to that effect, to appoint a future new or special meeting to determine independent matters not taken up, and which could not legally have been taken up, at the stated meeting, and to act at such future time, unless *all* have *actual* notice. If any one thus entitled to notice does not receive it, and is not present, the action is

By the charter of a city, the power of imposing taxes belonged to the inhabitants assembled in annual town meeting. It was provided, that if, at this meeting, no tax was voted, or insufficient tax, the common council "should call a meeting of the inhabitants, by advertisement or otherwise," for the purpose of having them vote a tax. The court seemed to be of opinion, that the common council were obliged to specify the objects of the call in their notice, it being a special meeting; and it decided, that if it did specify a particular purpose, that any act of the meeting, "wholly beside the special purpose of the meeting as stated," was void.¹

§ 225. *A regular meeting, unless special provision is made to the contrary, may adjourn to a future fixed day; and at such meeting it will be lawful to transact any business which might have been transacted at the stated meeting, of which it is, indeed, but the continuation. Unless such be the special requirement of the charter or a by-law, the adjourned regular meeting would not, it is supposed, be limited to completing particular items of business which had been actually entered upon and left unfinished at the first meeting; but might, if the adjournment was general, do any act which might have been done had no adjournment taken place.* Where the meeting, if a regular one, can only act upon a specific matter, or, if a special one, can only act upon matters of which notice has been given to the members, while it is competent, in either case, to adjourn, the adjourned meeting is, in both cases, limited, equally with the first meeting, to the specified matters.²

void. *People v. Batchelor*, 22 N. Y. 128, 1860; to be read in connection with *Smith v. Law*, 21 N. Y. 296.

¹ *Bergen v. Clarkson*, 1 Halst. (N. J.) 352, 1796. See, also, *Rex v. Liverpool*, 2 Burr. 785; *Rex v. Doncaster*, 1b. 875; *King v. Mayor, &c.*, 1 Str. 385; *Machell v. Nevinson*, 2 Ld. Raym. 1355; 2 Bac. Abr. 18.

² *Smith v. Law*, 21 N. Y. 296; *Warner v. Mower*, 11 Vt. 385; *People v. Batchelor*, 22 N. Y. 128; *Rawlinson on Corp.* (5th ed.) 186, note; *Scadding v. Lorant*, 5 Eng. Law and Equity, 16, 1851; *People v. Martin*, 1 Seld. (N. Y.) 22; *Street Case*, 1 La. An. 412; *Hudson Co. v. State*, 4 Zab. 718. Adjournment by minority to day appointed for regular meeting. *People v. Rochester*, 5 Lansing (N. Y.) 142, 1871.

³ *Scadding v. Lorant*, 5 Eng. Law and Equity, 16; S. C., 17 Law T. 225,

Mode of Proceeding when Convened.

§ 226. After a meeting of the council is duly convened, the *mode of proceeding* is regulated by the charter or constituent act, by ordinances passed for that purpose, and by the general rules, so far as in their nature applicable, which govern other deliberative and legislative bodies. If the council consists of two boards, the concurrence of both is essential to valid legislation, and this concurrence must be by simultaneously existing bodies.¹ The rule of legislative bodies consisting of two branches, that unfinished business at the end of a session is discontinued, and must be afterwards taken up anew, if at all, was considered applicable to the legislative acts of the common council of New York, composed of a board of aldermen and a board of assistant aldermen.²

H. of L. 1851. In this case, the statute (a local act) required notice to be given of a meeting of vestrymen to be held for the *purpose* of making a rate for the relief of the poor. Such notice was given, specifying the purpose of the meeting; the meeting was held accordingly, on the 12th of August, when it was resolved that a rate should be made; but as the details could not be completed, the meeting was adjourned, and at an adjourned meeting the matter of the rate was completed; but the notice for the adjourned meeting contained no mention of the purpose for which the meeting assembled. And the question which the House of Lords put to the judges, in reference to the adjourned meeting, was: "Supposing the rate to be otherwise valid, was it invalid by reason of the notice not stating the purpose for which the [adjourned] meeting assembled?" The judges answered: "We are unanimously of opinion, that the rate was not rendered invalid by reason of the alleged defect in the notice of the adjourned meeting. It was sufficient to give notice [as required by the act] on the church door of the purpose for which the first meeting was to be held, and, that notice having been duly given, we think that the notice so given extended to all the adjourned meetings, such adjourned meetings being held for the purpose of completing the unfinished business of the first meeting, and being in continuation of that meeting." And such was the judgment of the House of Lords. See, also, *King v. Harris*, 1 Barn. & Ad. 936.

Presumption as to regularity of adjournment when proceedings of the adjourned meeting come before the court: *Hudson Co. v. State*, 4 Zab. (N. J.) 718; *Insurance Co. v. Sortwell*, 8 Allen, 217; *State v. Jersey City*, 1 Dutch. (N. J.) 809.

¹ *Wetmore v. Story*, 22 Barb. 414, 1856.

² *Wetmore v. Story*, 22 Barb. 414, 1856. A subsequent council is bound

§ 227. The council may ascertain facts through the medium of a *committee*, and the members of the council may where they know the facts of their personal knowledge, act without further inquiry.¹ As a public corporation may entirely revoke the powers of a committee it has appointed, so it may control the execution of those powers by increasing the number of the committee. If the new members, either by design or mistake, are excluded from acting, the proceedings of the others will be irregular.²

§ 228. At any time before the *rights of third persons* have attached, a council or other corporate body may, if consistent with its charter and rules of action, *rescind* previous votes and orders.³ Thus a vote levying a tax, so long

by knowledge duly communicated to a previous council. *Bank v. Seton*, 1 Pet. (U. S.) 299, 1828. In *Commonwealth v. Lancaster*, 5 Watts, 152, *Gibson*, C. J., expressed his opinion to be, that notwithstanding a by-law or rule requires certain corporate acts to be in a given form, and that alterations of such by-law or rule shall only be made by a vote of two-thirds of the members, yet that a majority may repeal the by-law or rule, and may, without such repeal, do valid acts, not in the prescribed form, by a majority vote.

¹ *Bissell v. Jeffersonville*, 24 How. (U. S.) 287, 296, *per Olifford*, J.; *Commonwealth v. Pittsburg*, 14 Pa. St. 177, 1850. As to power of council to appoint officers, and when it may delegate its powers to a committee: *Ib.*; *Preble v. Portland*, 45 Maine, 241; *ante*, sec. 60.

² *Damon v. Granby*, 2 Pick. 845, 1824. In this case it was further held, where the agents of a town contracted with the plaintiff "to erect a meeting-house on a place to be designated by a committee of the town," that the town might disagree to the selection, and "designate the place for themselves, at any time before the ground was prepared," on indemnifying the plaintiff for any extra labor or expense which their fluctuating proceedings may have occasioned. A notice to appear before a committee to whom a matter, as for example, the laying out or altering of a street, has been duly referred, is equivalent to a notice to appear before the city council, as, for this purpose, the committee represent the council. *Preble v. Portland*, 45 Maine, 241, 1858.

³ *Bigelow v. Hillman*, 37 Maine, 58; *Reiff v. Conner*, 5 Eng. (Ark.) 241; *State v. Hoyt*, 2 Oregon, 246; *ante*, sec. 41; *Road Case*, 17 Pa. St. 71, 75; *New Orleans v. St. Louis Church*, 11 La. An. 244. Reconsideration at subsequent meeting. *Locke v. Rochester*, 5 Lansing (N. Y.) 11, 1871; *Sauk v. Philadelphia*, 1 Pa. Leg. Gaz. Rep. 259." The right of *reconsidering* lost measures [at the same meeting, or pursuant to its rules] inheres in every body possessing legislative powers." *Per Whelpley*, C. J., *Jersey City v.*

as it rests in mere resolution, and has not been acted upon, may be reconsidered, and, if rescinded, the collector cannot legally proceed to collect the tax.¹

§ 229. A provision of a city charter, that the *ayes and nays shall be called* and published whenever the vote of the common council should be taken on any proposed improvement involving a tax or assessment upon the citizens, was considered, by two of the three members of the Supreme Court of New York, notwithstanding the use of the word "*shall*," to be directory merely; "the essential requisite being the determination of the corporation, and not the form or manner of expressing that determination." But an opposite view has elsewhere, as we think properly, been taken of similar provisions, the court regarding the requirement that votes shall, in such cases, be entered at large on the minutes, as intended to accomplish an important public purpose, and therefore consider the requirement as

State, 1 Vroom (N. J.) 521, 529, 1863; Red v. Augusta, 25 Ga. 386. "All deliberative assemblies, during their session, have a right to do and undo, consider and reconsider, as often as they think proper, and it is the result only which is done." *Per Kirkpatrick*, C. J., in State v. Foster, 2 Halst. (N. J.) 101, 107, 1823. See, also, State v. Jersey City, 8 Dutch. 536. While public money is in the possession of the proper officer, the proper authorities have entire control over it, and they may, so far as the officer holding it is concerned, rescind a prior order (not yet complied with) to pay money to an individual. Tucker v. Justices, 13 Ire. (N. Car.) Law, 484; Dey v. Lee, 4 Jones (N. Car.), Law, 238. A resolution is not invalid because passed upon a reconsideration of a negative vote moved by one who voted originally with the minority Locke v. Rochester, 5 Lansing (N. Y.) 11, 1871. But in Sauk v. Philadelphia, 8 Phila. Rep. (by Wallace) 117, a *nisi prius* decision of the Supreme Court, it was held that the city councils having once voted to sustain the mayor's veto of an ordinance passed by them, could not reconsider this vote, nor take any further action on the measure. 6 Am. Law Rev. 720.

¹ Stoddard v. Gilman, 22 Vt. 568; Pond v. Negus, 3 Mass. 230.

² Striker v. Kelly, 7 Hill (N. Y.) 9, 24, 29, 1844, *Bronson*, J., dissenting; S. C. in Error, 3 Denio, 823; see McCormick v. Bay City, 23 Mich. 457, 1871; Indianola v. Jones, 29 Iowa, 282; *In re* Mount Morris Square, 2 Hill, 20; Elmendorf v. Mayor, &c. of N. Y., 25 Wend. 693. In Morrison v. Lawrence, 98 Mass. 216, the grant of an important special power was construed to require, as a condition to its exercise, the taking of the ayes and nays, and a record of the vote. The decision or determination of a question by

mandatory and its observance essential to valid corporate action.¹

§ 230. Acts done *when less than a legal quorum* is present, or which were not concurred in by the requisite number, are void.² This is a fundamental rule in the law of corporations; but whether, in favor of the holder of negotiable securities issued, or purporting to be issued, under authority conferred by the legislature, the corporation might not, in some cases, be estopped to show that a quorum was not present or that the requisite number did not concur in the act, is a question which remains, perhaps, to be settled.³ It is clear that members of a council cannot properly act in questions upon which their own pecuniary interest is directly and specially involved. But it has been held in Michigan that proceedings on the part of a municipal corporation ordering a paving improvement are not rendered invalid on the ground that two of the aldermen who formed part of the quorum of the common council, which ordered the improvement, and without whose presence there would have been no quorum, were petitioners for the improvement and owners of property liable to assessment

a town meeting or common council should be, and probably must be, by a formal *vote* or *resolution*. *People v. Adams*, 9 Wend. 333, 1832; *Denning v. Roome*, 6 Wend. 651, 1831.

¹ *Steckert v. East Saginaw*, 23 Mich. 104, 1870, where the purpose of the requirement is well expounded; *Spangler v. Jacoby*, 14 Ill. 297; *Supervisors, &c. v. People*, 25 Ill. 297; *Morrison v. Lawrence*, *supra*; *McCormick v. Bay City*, 23 Mich. 457, 1871; *Delphi v. Evans*, 36 Ind. 90, 1871. Accordingly a provision of statute that no ordinance for the improvement of a street should be adopted, except upon the report and recommendation of the city board of improvements, and requiring that such report be *recorded* in its proceedings, is mandatory, and the report and recommendation were held jurisdictional and not provable by parol evidence. *Reynolds v. Schweinefus*, 1 Sup. Court Cin. (O.) Rep. 113.

² *Logansport v. Legg*, 20 Ind. 315, 1863; *Ferguson v. Chittenden Co.*, 1 Eng. (Ark.) 479, 1846; *Price v. Railroad Company*, 18 Ind. 58, 1859; *McCracken v. San Francisco*, 16 Cal. 591; *Piemental v. San Francisco*, 21 Cal. 351; *State v. Wilkesville*, 20 Ohio St. 288. Number present and acting, how proved. 18 Ind. 58, *supra*. Presence of quorum, when presumed. *Insurance Company v. Sortwell*, 8 Allen, 217.

³ See *ante*, sec. 55; *post*, chapter on Contracts. Construction of charter provision requiring *unanimity*: *post*, sec. 247.

therefor. It might be otherwise, the court concede, if the common council acted as commissioners of apportionment in making the assessment upon the property that was to bear the burden, or on the confirmation of a report in which the interest of these aldermen was directly involved.¹

¹ *Steckert v. East Saginaw*, 22 Mich. 104, 1870, where the reasons for the distinctions taken are clearly stated by *Cooley, J.*

Right of corporation to contract with its officers or councilmen. Anta, sec. 231, note 3, and cases cited. Post, sec. 371, note.

CHAPTER XI.

CORPORATE RECORDS AND DOCUMENTS.

§ 231. Corporations have the incidental power, if the regular clerk is temporarily absent, to appoint a private person a *clerk pro tem.* for the purpose of making the entries of what is transacted at the corporate meeting. His entries, made by the direction of the corporate authorities, or entries made by the regular clerk from memoranda furnished by the clerk *pro tem.*, are competent evidence of the proceedings of the meeting.¹

§ 232. The clerk or officer of a New England town' *who has made an erroneous record*, may, while in office (but not afterwards), or after a re-election to the same office, *amend* the same according to the truth, being liable, like a sheriff who amends his return, for any abuse of the right, as where he makes a fraudulent or untruthful amendment. the town is not concluded or bound by an erroneous record, whether made by design or accident, unless when it would, on general principles, be estopped.²

¹ Hutchinson v. Pratt, 11 Vt. 402, 1839. See also Rex v. Mothersell, 1 Stra. 93, also referred to *infra*. Sufficiency of memoranda: Louisville v. McKegney, 8 Bush (Ky.) 651, 1870. Failure of clerk to take *oath of office* does not invalidate his record. Stebbins v. Meritt, 10 Cush. 27. *Ante*, sec. 153. *Signature of chairman* to minutes affixed at a day subsequent to the meeting, held sufficient, under a statute requiring the minutes of corporate meetings to be signed by the chairman. Miles v. Bough, 3 Gale & D. 119; Inglis v. Railway Company, 16 Eng. Law and Eq. 55. See, also, chapters relating to Corporate Meetings and Corporate Officers. *Post*, sec. 265.

² *Ante*, secs. 12, 13, as to New England towns.

³ Cass v. Bellows, 11 Fost (N. H.) 501, 1855; Harris v. School District, 8 Fost. 58, 66, 1853; Gibson v. Bailey, 9 N. H. 168; Whittier v. Varney, 10 N. H. 291; Wells v. Battelle, 11 Mass. 477; Low v. Pettingill, 12 N. H. 340; Pierce v. Richardson, 37 N. H. 306; Scammon v. Scammon, 8 Fost. 429; President, &c. v. O'Malley, 18 Ill. 407, 1857; Mott v. Reynolds, 27 Vt. (1 Wms.) 206, 1855; Boston Turnpike Co. v. Pomfret, 20 Conn. 590, 1850; *con*

§ 233. In a case in Vernont, the clerk of the town, *pending a trial, amended the record* by adding his signature as clerk to the record of the warning for the meet-

pare Covington v. Ludlow, 1 Met. (Ky.) 295, below cited. The necessity and reasonableness of the doctrine, stated in the text, are thus expounded by Parker, C. J., in Wells v. Battelle, 11 Mass. 477, 481, 1814: "We have had frequent occasion to perceive the great irregularity which prevails in the records of our towns and other municipal corporations; and the courts have always been desirous to uphold these proceedings, where no fraud or willful error was discoverable. Too much strictness on subjects of this nature would throw the whole body politic into confusion [Kellar v. Savage, 17 Maine, 444]. For it cannot be expected that, in all corporations, persons will be every year selected, who are capable of performing their duty with the exactness which would be useful or convenient." "The first entry made by the clerk here [that an officer was *sworn* into office] was certainly defective, but the defect is properly cured by the subsequent entry of the existing clerk, he being the same person that officiated at the time of the first entry. He will be sufficiently watched by interested parties, to render a deviation from truth neither safe nor easy." The doctrine of the case in 11 Mass. 477, was followed and applied in Chamberlain v. Dover, 13 Maine, 466, 1836, where it was further held, that the municipal body was not bound by an erroneous record of a clerk, even though the plaintiffs, confiding in its correctness, had made a building contract with the "contracting and building committee" named in the record. The meeting, in this case, which attempted to confer this power upon the committee, was not a legal one, because not held at the time and place appointed; and it was considered by the court that the plaintiffs' remedy was against the committee and not against the town, if the former acted without authority. See further, as to correcting and amending records, Williams v. School District, 21 Pick. 75, holding that where two different, but not contradictory, records were made up by the clerk from memoranda taken at the meeting that both were originals and competent testimony.

Clerk cannot amend records after he is out of office. School District v. Atherton, 12 Met. 105, 1846; Hartwell v. Littleton, 13 Pick. 229, 232, 1833; *Contra*, to the effect that he may amend, though out of office at the time, see Gibson v. Bailey, 9 N. H. 168, 1838. But may, while he is *in office*. Bishop v. Cone, 3 N. H. 513, 1821; Hoag v. Durfey, 1 Aiken (Vt.) 286, 1826; Chamberlain v. Dover, 13 Maine, 466, 1836. That *successor* cannot make the amendment. State v. Williams, 25 Maine, 561, 555; 29 *Ib.* 523 Taylor v. Henry, 2 Pick. 397. But the corporation might, in proper cases, authorize the successor to supply the omitted, or correct the erroneous, entry. Hutchinson v. Pratt, 11 Vt. 402, 419.

In *New Hampshire* it is the practice to allow these amendments only upon the order of the Supreme Court or Court of Common Pleas by the officer by whom they were made, even after he has ceased to hold the office. A clear case must be made out. The court do not permit any erasures or interlinations of the original record, but require the amendment to be written

ing in question. His right to do so though he had meantime been out of office, but was again restored, was sanctioned by the Supreme Court, *Redfield*, C. J., remarking: "We think, in general, it must be regarded as the right of the clerk of a town or other municipal corporation, while having the custody of the records, to make any record according to the facts. His having been out of office, and restored again, could not deprive him of that right. But even an officer could not alter or amend a record upon the testimony of third persons ordinarily, and ought not to do it upon his own recollection unless in very obvious cases of omission or error, of which the present might fairly be regarded as one, probably. Such amendments should ordinarily be made by the original documents or minutes."¹ The right of *the clerk ex parte* to amend the records of the proceedings of town corporations was very thoroughly considered in a case in Connecticut.² The statute of that state requires town clerks to keep the record books of their respective towns, and to enter truly all the votes and proceedings of the town. The town clerk made an entry showing that at a town meeting held in 1843, the town assumed to the plaintiff a liability to commence January 1, 1844. If the time thus stated was the true time, the plaintiff had a cause of action against the town. In 1849, the clerk, not upon his own personal knowledge, nor upon any written memorandum, but on the information of others (with the correctness of which, however, he was perfectly satisfied), amended the record so as to show that the liability of the town was not, by the vote, to commence until April 1, 1844. If this was the true time, the plaintiff had no cause of action. The majority of the court (three judges against two) held that the clerk, still continuing in office,

upon a separate piece of paper, signed by the proper officers, and with it a copy of the order allowing the amendment; and this paper is annexed to the original record. *Pierce v. Richardson*, 37 N. H. 806, 811, *per Bell*, J.

¹ *Mott v. Reynolds*, 27 Vt. (1 Wms.) 206, 208, 1855. Amendments in open court of town record by clerk of the town pending trial, to which the clerk is a party, and to meet a particular decision of the court, disregarded. *Hadley v. Chamberlain*, 11 Vt. 618, 1839. Commented on and distinguished. *Mott v. Reynolds*, 27 Vt. (1 Wms.) 206, 1855.

² *Boston Turnpike Co. v. Pomfret*, 20 Conn. 590, 1850.

was competent to amend the record—that this power is derived solely from his official character, and does not depend on the permission of the court in which the record is offered as an instrument of evidence, nor on inquiry into the truth of it as originally made, or as amended, and that such a record is, in such an action, conclusive evidence of its own truth. The dissenting judges, without denying the power of amendment in all cases, were of opinion that in view of the lapse of time, the absence of written memoranda, or personal recollection by the clerk, the clerk had no authority to make the amendment, and that the correct course would have been to have made application to the proper court by legal process. *e. g.*, *mandamus*, to correct the mistake in the record, if one existed, and thus give the opposite interested party an opportunity to show that the record was already right. It would seem, under the special circumstances that the dissenting view was the better one.

§ 234. Where the clerk makes up the record of the proceedings of the council, and it is *read and approved* at the same or at a subsequent meeting, the author doubts his authority, on his own motion, to amend it afterwards without the direction of the council. The council, unless private rights have attached, may, doubtless, order the record of its own proceedings, even after it has once been approved, to be corrected according to the facts. The Court of Appeals of Kentucky, without determining the extent of the power of the same council at a subsequent meeting, to correct errors and omissions in the journal entry of proceedings at a previous meeting, decided that this could not be done *by an entirely new board* in respect to the official action of their *predecessors*; and it was accordingly held, that where the records, as kept, showed only that in August, 1854, an ordinance was reported, a new council could not, in 1856, add to the records words showing that the ordinance *had passed*, nor could the fact of its passage be shown by extrinsic evidence.¹

¹ Covington v. Ludlow, 1 Met. (Ky.) 295, 1858; see, also, Lexington v. Headley, 5 Bush (Ky.) 508, 1869; Graham v. Carondelet, 33 Mo. 262; State v. Jersey City, 1 Vroom (N. J.) 93, 148, and chapters on Corporate Meetings and ordinances, *post*, sec. 247; *ante*, sec. 228.

§ 235. *Parol evidence* may, if necessary, be admitted to apply a resolution or recorded vote of a town to its proper subject matter,¹ but not, in general, to explain, enlarge, or contradict its terms or meaning, in respect to matters (as, for example, laying out a highway or street) regularly within the jurisdiction of the town or its officers, and where the entry of record is made in pursuance of law.² Where the record of a meeting states that "the inhabitants met and adjourned the meeting," *parol evidence* may be admitted to show when and where the meeting was held, how many were present, and how many afterwards came, and, finding no meeting, went home.³

§ 236. *Parol evidence* in a collateral action cannot be

¹ *Baker v. Windham*, 13 Maine (1 Shep.) 74, 1836. In this case the town of Windham entered upon its records the following: "Voted to indemnify *Benj. Baker*, in his costs in the action against *A. Small*, which have or may arise in the same on account of *Gray* line." In an action by Baker against the town to recover costs of a suit which he had brought against Small, parol evidence was adjudged to have been rightly admitted to show that Baker brought the action in his name against Small, on account of the *Gray* line, at the request of the selectmen of Windham, for the purpose of settling a disputed line between that and the adjoining town, with the express agreement that the town should pay all costs, and to show that these facts were before the town when the vote was passed, and also to show that the suit so instituted was conducted under the advice and direction of the authorities of the town.

² *Manning v. Fifth Parish, &c.* 6 Pick. 16; *Crommett v. Pearson*, 18 Maine, 344; *Covington v. Ludlow*, 1 Met. (Ky.) 295; *Cabot v. Britt*, 36 Vt. 349; *Lexington v. Headley*, 5 Bush (Ky.) 508, 1869. *Post*, sec. 247; *ante*, sec. 229.

³ *Chamberlain v. Dover*, 13 Maine, 466, 1836. But parol evidence of an adjournment to another day cannot be given so as to validate acts done on the day adjourned to. *Taylor v. Henry*, 2 Pick. 397. Where a statute requiring a record to be made of the persons sworn into office is directory, if the record is not made, the fact may be shown by parol or other competent evidence. *Kellar v. Savage*, 17 Maine (5 Shep.) 444, 1840. In the *M. E. Corporation v. Herrick*, 25 Maine, 354, it was held, that to establish a resulting trust in the corporation [with respect to lands], it could not prove the authority of the committees to act for it by parol evidence; the authority should appear, and could only be shown by its records. Further as to what facts may be shown by parol: *Bath v. County Commissioners*, 36 Maine, 74; 35 *Ib.* 373; *Smith v. County Commissioners* 42 Maine, 395. *Ante*, sec. 206, and note. *Post*, sec. 247.

received *to contradict* the records of a public corporation, required by law to be kept in writing, or to show a *mistake* in the matters as therein recorded. Thus, if the records of a school district show that the district voted to authorize their clerk to call and warn “their *annual* meetings,” parol evidence in an action by the district is not admissible to prove that the real vote of the district was to authorize the clerk to call and warn *all* district meetings.¹ So, where the record of a town stated the warning to have been on the 17th, and the meeting to have been held on the 19th of January, parol evidence cannot be admitted to show that, by mistake, the clerk inserted the “19th” instead of the “29th.” The remedy is, to have him correct the record, if in office, according to the truth.²

§ 237. But a *distinction* has sometimes been drawn between evidence to contradict facts stated on the record and evidence to show facts *omitted* to be stated upon the record. Parol evidence of the latter kind is receivable unless the law expressly and imperatively requires all matters to appear of record, and makes the record the only evidence.³ Thus, in a well-considered case in the Supreme

¹ School District v. Atherton, 12 Met. 105, 1846; Morrison v. Laurence, 98 Mass. 219; Mayhew v. Gayhead, 18 Allen, 129.

² Durfey v. Hoag, 1 Aiken (Vt.) 286, 1826. So in *Connecticut*, if a town corporation makes an erroneous record of its proceedings, this cannot be contradicted in a collateral action. In such an action the record is conclusive. If false, and the corporation will not correct the record, a party interested may, by *mandamus*, compel it to make the correction. Boston Turnpike Co. v. Pomfret, 20 Conn. 500, 1850. Upon this point, all the judges, though different on other points, seemed to agree. *Post*, chap. XIX. *Supra*, sec. 283.

Purchasers of such paper [bonds issued by cities for stock in railroads] look at the form of the paper, the law which authorized it to be issued, and the *recorded* proceedings on which it is based. Therefore, as against purchasers, the record cannot be contradicted by parol evidence. *Per Clifford, J.*, in Bissell v. Jeffersonville (action on municipal bonds), 24 How. (U. S.) 287, 298. See chapter on Contracts, *post*, as to the rights of holders of such securities.

³ Moor v. Neufield, 4 Greenl. 44, 1826. “The only legal mode of proving facts on record is by the record itself, or by an attested copy of it.” *Ib. per Mellen, C. J.*; School District v. Atherton, 12 Met. 105, 118, 1847, *per Dewey, J.*; Langsdale v. Bonton, 12 Ind. 467; Indianapolis v. Imberry, 17 Ind. 175.

Court of the United States,' it was held, that the acts of a corporation might be proved otherwise than by its records or some written document, even although it was its duty

179; *Delphi v. Evans* (referring to previous cases), 36 Ind. 90, 1871; *Bigelow v. Perth Amboy*, 1 Dutch. (N. J.) 297, 1855; *Gearhart v. Dixon*, 1 Pa. St. 224, 1845. Where the law or charter *requires* the clerk to keep a *journal* of all of the acts and proceedings of the city council, that, or a copy, is the proper evidence of the official doings of the body. *City of Lowell v. Wheelock*, 11 Cush. 891, 1853; *Harris v. Whitcomb*, 4 Gray, 483; *Morrison v. Lawrence*, 98 Mass. 219; *Louisville v. McKegney*, 7 Bush (Ky) 651, 1870. *Post*, sec. 247.

¹ *Bank, &c. v. Dandridge*, 12 Wheat. 64. Delivering the opinion of the court, Mr. Justice *Story*, *arguendo*, makes these important observations: "Would the omission of the corporation to record its own doings have prejudiced the rights of the party relying upon the good faith of an actual vote of the corporation? If such omission would not be fatal to the plaintiff in suits against the corporation (as, in our opinion, it would not be), it establishes the fact, that acts of the corporation, not recorded, may be established by parol proofs, and, of course, by presumptive proofs. In reason and justice, there does not seem any solid ground why a corporation may not, in case of the omission of its officers to preserve a written record, give such proofs to support its rights as would be admissible in suits against it to support adverse rights. The true question in such case would seem to be, not which party was plaintiff or defendant, but whether the evidence was the best the nature of the case admitted of, and left nothing behind in the possession or control of the party higher than secondary evidence." "We do not admit, as a general proposition, that the acts of a corporation are invalid merely from an omission to have them reduced to writing, unless the statute creating it makes such writing indispensable as evidence, or to gives them an obligatory force. If the statute imposes such restriction, it must be obeyed." (12 Wheat. 69, 74.) The same principle was applied, in the case of the *United States v. Fillebrown*, 7 Pet. 28, to the acts of boards of public agents or officers, and it was in that case accordingly held, that the board of commissioners of the navy hospital fund, not being required by law to reduce its proceedings to writing, in order to make them binding, oral evidence of such proceedings (no record having been made) was competent. *Langsdale v. Bonton*, 12 Ind. 467.

"It appears to us, that in the absence of *all record*, it might be competent for the defendants (trustees and collector of the corporation justifying under its proceedings) to show, by parol, the proceedings of the meeting. Where there is a record, it cannot be added to or varied by parol. *Taylor v. Henry*, 2 Pick. 408. But where there is an omission to make records, the rights of other persons acting under or upon the faith of a vote not recorded, ought not to be prejudiced. And it would seem that the right in such a case is reciprocal in the corporation and in those who claim ad-

“to keep a fair and regular record of its proceedings.” The statute did not prescribe that nothing but a recorded vote or written document should bind the corporation or be received as evidence. Such written evidence was not deemed indispensable unless positively required. The direction to keep a record was regarded as directory.

§ 238. Where the records of a municipal corporation have been so carelessly and imperfectly kept as not to show the adoption of a resolution or other acts of the city council, and there is no written evidence in existence, *parol testimony* may be admitted; *e. g.*, to show that certain work was done by authority of the city, by proving the passage of a resolution of the council, the appointment of a committee to make the expenditure, their report after the work was done, and its adoption by the council.¹

versely to it.” *Per Williams*, C. J., *Hutchinson v. Pratt*, 11 Vt. 402, 421. But compare *Stevens v. Eden, &c. Society*, 12 Vt. 688; 16 *Ib.* 439; 17 *Ib.* 837.

The rights of *creditors, or of third persons*, cannot be prejudiced, by the *neglect* of the council to keep proper minutes; against the corporation what the council in fact did, may be shown by evidence *aliunde* the record kept by it. *Bigelow v. Perth Amboy*, 1 Dutch. (N. J.) 297, 1855; *San Antonio v. Lewis*, 9 Texas, 69, 1852.

Proof of the action and orders of a municipal *board of health*, see chapter on Ordinances, *post*, sec. 305, note.

¹ *Ross v. Madison*, 1 Ind. (Carter) 281, 1848; *Langsdale v. Bonton*, 12 Ind. 467; *Indianapolis v. Imberry*, 17 Ind. 175, 179; *Delphi v. Evans* (reviewing previous cases), 36 Ind. 90, 1871. In the same state, however, county commissioners and township trustees are required by law to keep a true record of their proceedings, and it is held that they “can only speak by their record” when legally assembled. *County Commissioners v. Chitwood*, 8 Ind. 504, 507, 1851; *Trustees v. Osborne*, 9 Ind. 458. So, in *Maine*, “school districts are required by law to keep an account of their proceedings by a sworn clerk, and such proceedings can be proved only by the record or a copy thereof duly authenticated.” *Jordan v. School District*, 38 Maine 164, 1854. The records of public or *quasi* corporations are not, in *Ohio*, considered to be “of that absolute verity that any person shall be estopped to show the truth in consequence of any matter which they contain” or omit to contain; and it was accordingly adjudged that the fact whether an official bond was received or refused and rejected may be shown by *parol* evidence, on which point the record was silent. *Westerhaven v. Clive*, 5 Ohio, 136, 1821, as to records of township trustees. See *Green v. State*, 8 Ohio, 810, 1838, in which it was queried, whether the county commissioners could

§ 239. *Mandamus* is an appropriate remedy for the duly elected and authorized officer of a public or municipal corporation to compel the *delivery* to him by his predecessor, or by an usurper, of the *books, papers, records, and seal* pertaining to the office.¹ And such a corporation may maintain *replevin* in its name for the possession of its records; and this action is maintainable against a stranger

appoint an agent by *parol* or only by record? In *Iowa*, it has been held that where no record entry is made such an appointment may be shown by *parol* testimony and that the agent acted accordingly. *Poweshiek County v. Ross*, 9 *Iowa*, 511; *Athearn v. District*, 88 *Iowa*, 105, 1871; and see acc. *Ross v. Madison*, 1 *Carter (Ind.)*, 281; compare *Meeker v. Van Rensselaer*, 15 *Wend.* 397. Where recording is not required by charter or law, resolutions of a council are admissible in evidence, although not recorded. *Darlington v. Commonwealth*, 41 *Pa. St.* 68. See *post*, sec. 247; *Louisville v. McKegney*, 7 *Bush. (Ky.)* 651, construing charter as to requisites of the journal required to be kept by each board of the council.

¹ *Proprietors of Church v. Slack*, 7 *Cush.* 226, 289, 1851; *Commonwealth v. Athearn*, 3 *Mass.* 285; *Rex v. Wildman*, 2 *Strange*, 879; *King v. Ingram*, 1 *W. Bl.* 50; *King v. Round*, 4 *Ad & El.* 189; *Cranford v. Powell*, 2 *Burr.* 1013; *Rex v. Clapham*, 1 *Wils.* 305; 3 *Bl. Com.* 310; *Kimball v. Lamprey*, 19 *N. H.* 215, 1848, where the above authorities are cited and digested by *Gilchrist, C. J.*; *Taylor v. Henry*, 2 *Pick.* 397; *Parish, &c. v. Stearns*, 21 *Pick.* 148, 156; *Bates v. Plymouth*, 14 *Gray*, 163; *Perkins v. Weston*, 3 *Cush.* 549.

The following points have been ruled in respect to corporations in England: If the custody of their documents belong to one of their officers in virtue of his office, the corporation cannot compel him to deliver them up, but may require that he submit them to their inspection whenever they think proper. *Rex v. Ipswich*, 2 *Ld. Raym.* 1238; *Rex v. Pigram*, 2 *Burr.* 767; *Willc.* 345; *Glover*, 260. Sometimes the custody of these documents is entrusted to the town clerk or other officer, merely as the servant of the corporation, in which case they may appoint another to receive them, and if they are not delivered over after demand, the corporation may obtain possession of them by an action of *detinue* or the court will compel a delivery by *mandamus*. *Ib.* If the predecessor in office, or, he being dead, his personal representative, or another person having possession of corporate documents under him, refuse to deliver them over to the successor or the corporation, on a proper application, the court will grant a *mandamus* to compel him to do so. *Rex v. Nottingham*, 1 *Sid.* 31; *Anonymous*, 1 *Barnard*, 402; *Willc.* 345; *Glover*, 260. This writ is said, indeed, to lie to any person, whether stranger or corporator, who happens to be in possession of the books of a corporation, and who refuses to deliver them up. *Proprietors of Church v. Slack*, 7 *Cush.* 226, 281, 1851, *per Fletcher, J.*; *Rex v. Ingram*, 1 *W. Bl.* 50; *Willc.* 246; *Glover*, 231. *Post*, chap. XX.

or any officer or person not legally entitled to the custody of the records.¹

§ 240. Concerning the right to *inspect corporate documents and papers*, the following points have been ruled as stated by Mr. Willcock: Every *corporator has a right to inspect* all the records, books, and other documents of the corporation, upon all proper occasions; and if, upon application for that purpose, the officer who has the custody refuse to show them, the court will grant a *mandamus* to enforce his right.² One who has a *prima facie title to a corporate office* has a right to inspect such documents as relate to that title, and may obtain a *mandamus* for this purpose before any suit has been instituted.³ A corporator has a *right* to inspect these documents, to obtain information as to his rights, whether in dispute with a stranger or the corporation itself, or any of its members.⁴ When the corporator's application to inspect is founded on his general right, he has a *mandamus*, but when it is founded on a suit pending,

¹ Parish, &c. v. Stearns, 21 Pick. 148; School District v. Lord, 44 Maine, 374—replevin for records of district. The court, holding that *replevin* would lie, say: "The action is, therefore, rightfully brought, and may be maintained if the defendant was not the legal clerk of the district." *Per Rice, J.*, 44 Maine, 374, 384. The *right or title of an office* cannot be determined by a civil action between the respective claimants, as by an action of replevin for the official books and papers, and until the issue as to the right is determined by *quo warranto* or other proper proceeding, no suit in replevin can be maintained by one claimant against the other for the possession of the appurtenances of the office. Desmond v. McCarty, 17 Iowa, 525. In La Grange v. State Treasurer, 24 Mich. 466, the court decided that replevin does not lie for papers filed in a public office. *Post*, sec. 684.

² Rex v. Shelley, 3 Term R. 142; Rex v. Babb, *Ib.* 580; Harrison v. Williams, 3 Barn. & Cress. 162; Rogers v. Jones, 5 D. & R. 484; Willc. 347; Glover, 262. *Any person* sufficiently interested is entitled to inspect entries in books of public corporations relating to public matters of the corporation, where the evidence is required in a civil action. Grant Corp. 311. See, also, People v. Cornell, 47 Barb. 329, in which it is held, that a corporator without any special or private interest has the right to inspect and take copies of all public documents and records, under reasonable restrictions to secure the safety of the originals.

³ Rex v. Newcastle, 2 Stra. 1223; Rex v. Lucas, 10 East, 235; Rex v. Purnell, 1 Wils. 242. *Post*, chap. XX.

⁴ Edwards v. Vesey, Cas. Temp. Hardw. 128; Rex v. Babb, 3 Term R. 580; Rex v. Bridgman, 2 Stra. 1203; Grant on Corp. 312.

he obtains a rule.¹ In an action by one corporation against another, rules were made absolute for each corporation to inspect so much of the books and records as related to the subject in dispute.² The *motion for the rule to inspect* and to have copies should be supported by affidavits showing the foundation of the claim, the application, the proper officer and his refusal. The rule will require the expense attending obedience to be borne by the applicant, and will, in proper cases, allow the officer a remuneration for his trouble. If the officer disobey, without sufficient reason, the rule to allow an inspection or to give copy of, or to produce corporate documents, the court will grant an attachment against him.³

§ 241. A public or municipal corporation, required by law to keep a record of its public, or official, proceedings, may itself use such *records as evidence* in suits to which it is a party; but the records must first be properly authenticated.⁴ Indeed, in actions generally, including actions

¹ *Rex v. Shelley*, 3 Term R. 142.

² *Mayor of London v. Lynn Regis*, 1 H. Bl. 206; *Mayor, &c. of Southampton v. Graves*, 8 Term R. 592.

³ Willc. 852, 358; Grant, 311 *et seq.* See, also, *People v. Mott*, 1 How. Pr. R. 247; *Cockburn v. Bank*, 13 La. An. 289; *People v. Walker*, 9 Mich. 328.

⁴ *School District v. Blakeslee*, 13 Conn. 227, 1839; *Denning v. Roome*, 6 Wend. 651; *Wood v. Jefferson County Bank*, 9 Cow. 205; *State v. Van Winkle*, 1 Dutch. (N. J.) 73; *McFarlane v. Insurance Company*, 4 Denio, 392; *Turnpike Company v. McKean*, 10 Johns. 154. *Denning v. Roome*, above cited, holds, that the *original minutes* or records of the corporation of a city were competent evidence of corporate acts, without further proof of their verity. Records of corporation held admissible, though not required by law to be kept, and, where defective, explainable by parol evidence. *Gearhart v. Dixon*, 1 Pa. St. 224, 1845; *Adams v. Mack*, 8 N. H. 493, 499, *per Richardson*, C. J.

The following points have been decided respecting English corporations: Where charters or corporation books are to be given in evidence, being records or instruments of a *public nature*, they may themselves be produced; and examined copies of their contents may also be given in evidence. The Court of King's Bench will not make a rule to produce the originals, unless it be shown by affidavit that a new entry, rasure, or some other circumstance, renders an inspection necessary. To give books this public character, it must appear, if they be questioned, that they have been publicly kept, and that entries have been made by the proper officers; not but that entries

against agents or officers of the corporation, as individuals, the *original minutes* or *records* of the corporation are competent evidence of the acts and proceedings of the corporation. Duly *authenticated copies* have often been received in evidence, where the original document or proceeding was of a public nature.'

made by other persons may be good, if the town clerk be sick or refuses to attend, which, however, must be proved, and the reason why they were not made by the proper officer shown. *Rex v. Mothersell*, 1 Stra. 93; *Brocas v. Mayor, &c. of London*, 1 Stra. 307; *Rex v. Gwyn, Mayor, &c.*, 1 Stra. 401; Willc. 343; Glover, 258; *Rex v. Smith*, 1 Stra. 126; Grant, 318. Whoever produces the book must establish its authority before he delivers it in, and may be required to show where it has been kept, and how it came to his possession. *Rex v. Mothersell*, 1 Stra. 93; *Rex v. Thetford*, 12 Vin. Abr. 90, p. 16; Willc. 344; Glover, 258. A book containing minutes of some corporate acts which occurred ten years ago, entirely written by the relator's clerk, who was not an officer of the corporation, and appearing never to have been kept among, or esteemed as, one of the corporate documents, or even seen before the present application for an information, is not admissible as a corporate document. *Rex v. Mothersell*, 1 Stra. 93. Nor is the copy of a letter made fifty years ago and found in the corporation chest, but the original must be first accounted for, as though it had been found in the possession of a private person. *Rex v. Gwyn*, 1 Stra. 401. Nor are entries of a *private nature*, in the public books of a corporation, evidence for them in support of a right which they claim, for this were allowing the party to fabricate evidence for themselves. *Rex v. Debenham*, 2 B. & Ad. 187; *Marriage v. Lawrence*, 3 B. & Ad. 144; Grant on Corp. 318, 319, and cases; 2 Phill. Ev. 122; Angell & Ames Corp. sec. 679; Willc. 344.

¹ *Denning v. Roome*, 6 Wend. 651, 1831; citing *Owings v. Speed*, 5 Wheat. 424; *Rex v. Mothersell*, 1 Stra. 93; 12 Vin. Abr. 90, pl. 16. See, also, *People v. Adams*, 9 Wend. 333; *Wood v. Jefferson County Bank*, 9 Cow. 194, 205; Angell & Ames on Corp. sec. 679; *Turnpike Company v. McKean*, 10 Johns. 154. In *Denning v. Roome*, *supra*, the defendant was sued in his *individual capacity* for removing, by order of the city council, a certain fence erected by the plaintiff. The defendant (although it was argued that, being the agent of the corporation, the latter should be considered as the *party* and its own records as incompetent in its own favor to justify its acts) was allowed to show by the records of the corporation that the fence was on a portion of the public street.

The clerk of a city or town is, by law, the proper certifying officer to authenticate copies of the votes and ordinances thereof. Such copies are admissible in evidence without preliminary proof, as in ordinary instruments, of the genuineness of the clerk's signature, but are, of course, only *prima facie* evidence, and they may be shown to be inaccurate, false, or forged. *Commonwealth v. Chase*, 6 Cush. 248, 1850. Where the original document is of a public nature, and would be evidence if produced, it is not necessary

§ 242. An admission by a corporation of a fact or of a liability, duly and properly made, is, of course, evidence against it. But a municipal corporation, by *accepting*, that is, *receiving the report of a committee* of inquiry, does not admit the truth of the facts stated therein; and such a report, though accepted by a vote of the corporation, is not admissible in evidence against it.¹ In an action of *assumpsit*

to show the document itself, for it may be required at many places at the same time; for that reason an immediate sworn copy, made by the proper officer, will be admitted. *Rex v. Lord George Gordon*, Doug. 593; 1 Phil. Ev. 405; Willc. 344; Glover, 259. Grant, 318, lays down the rule generally, that sworn copies of public entries in books of public corporations are admissible wherever the originals would be, and the corporation will not be compelled to produce their books in court except for reasons shown. It has, however, been held, that the by-laws of a corporation, in the absence of special provision, must be proved by the production of the by-laws themselves, as these are the primary evidence. *Lumbard v. Aldrich*, 8 N. H. 31, *Moore v. Newfield*, 4 Greenl. 44; *Hallowell Bank v. Hamlin*, 14 Mass. 178. So, of the votes of a corporation, the record is the best evidence. *Haven v. Asylum*, 13 N. H. 532. See, also, *Manning v. Parish*, 6 Pick. 6; *Taylor v. Henry*, 2 Pick. 403; *Green v. Indianapolis*, 25 Ind. 490. It may be remarked that there are statutes in various states under which certified copies would be receivable in evidence instead of the originals. Licenses from a city or town authorizing persons to pursue particular employments, &c., need not be in writing. *Boston v. Shaffer*, 9 Pick. 415, 1830.

¹ *Dudley v. Weston*, 1 Met. 477, 1846; followed by *Collins v. Dorchester*, 6 Cush. 396, 1850; and both relating to defective highways. In the *King v. Hardwick*, 11 East, 578; a rated parishioner made a confession, which was admitted in evidence against the parish, on the ground that the parish was an aggregate corporation or company, of which he was a member: compare *Mayor, &c. v. Long*, 1 Camp. 68. But this is not the law in this country, and it may be safely laid down that the admission of a corporator cannot be received against the body. *Hartford Bank v. Hart*, 3 Day (Conn.) 493, denying *King v. Hardwick*, *supra*; *Osgood v. Manhattan Co.*, 3 Cow. 612, 623. But the admission of an *officer* when made in the ordinary course of his official duty, and within the scope of his powers, may be admissible against the corporation. *Peyton v. Hospital*, 3 C. & P. 363; *Angell & Ames on Corp. sec. 309; Ib. sec. 650. Ante, sec. 176, note.*

Notice to corporator or member is not notice to the corporation; it should be formally given as such to the authorized head or proper officer; *Powles v. Page*, 3 Com. B. 81; *Edwards v. Railroad Co.*, 1 Myl. & Cr. 659; Grant, Corp. 315. Lancey brought an action for *libel* against the mayor and clerk of the city of Bangor for the following statement contained in their annual report: "Balance due from John Lancey, Collector, \$6,004.50." The balance was shown to be less. It was held that there was no presumption of law that the officers of a city or town knew the contents of the city records,

against a town corporation, to support his cause of action, the plaintiff produced the books of the corporation, by which it appeared that the sum demanded in the declaration had been allowed by the council to the plaintiff on the 5th of September, on final settlement, at which time the plaintiff was present and assented to the settlement. The defendant contended that the resolution had been passed by mistake, and offered to show, by the same books, the passage, *three days afterwards*, in the plaintiff's absence, of a resolution rescinding the amount of the plaintiff's account. It was held that the subsequent resolution was not competent evidence, the court basing this opinion on the proposition that the books of a corporation are evidence against, but not in its favor, in an action against the corporation by a stranger.¹

and no rule of law obliging them to be acquainted therewith, and unless the defendants made the publication maliciously they were entitled to a verdict. *Lancey v. Bryant*, 30 Maine (17 Shep.) 466, 1849. *Ante*, sec. 176, note.

¹ *Mayor v. Wright*, 2 Port. (Ala.) 230, 1835; citing 1 Stark Ev. 292; but is not the proposition too broadly stated?

CHAPTER XII.

MUNICIPAL ORDINANCES OR BY-LAWS.

§ 243. This subject will be considered under the following heads:—

1. Definition, General Nature, and Common Law Requisites of Ordinances—secs. 244–264.

2. Of the Signing, Publication, and Recording—secs 265–269.

3. Of the Power to impose Fines, Penalties, and Forfeitures—secs. 270–287.

4. On Whom Binding, and Notice thereof—secs. 288–290.

5. Ordinances Relating to the Licensing, Taxing, and Regulation of Amusements and Occupations, including the Sale of Intoxicating Liquors—secs. 291–299.

6. Ordinances Relating to Public Offences—secs. 300–302.

7. Ordinances Relating to the Public Health, Safety and Convenience; Herein of Hospitals, Cemeteries, and Burials; Nuisances; Markets and Inspection Regulations; Dangerous Occupations and Practices; and of the Police Power and General Welfare Clauses in Charters—secs. 303–340.

8. Mode of Enforcing Ordinances: Herein of Actions and Prosecutions, and their Nature; Mode of Pleading Ordinances; Requisites of Complaints to Enforce Ordinances; Construction, Defences, Evidence, &c.—secs. 341–355.

Definition, General Nature, and Common Law Requisites of Ordinances.

§ 244. *Definition.*—Under the general term of *ordinances* have been sometimes included all the regulations by which a corporation is governed, including special charter or statute regulations, as well as by-laws. In this country, the term ordinance is not usually applied, if ever, to charters

or acts of the legislature respecting municipal corporations, regulating their powers and mode of action, but is limited in its application to the acts, in the nature of local laws, passed by the proper assembly or governing body of the corporation. Indeed, in general and professional use, the term *ordinance* is almost, if not quite, equivalent in meaning to the term *by-law*, and is the word most generally used to denote the by-laws adopted by municipal corporations. According to Lord Coke, the word *by* or *bye* signifies a habitation, and thence a by-law in England, and a by-law or ordinance in this country, may be defined to be the law of the inhabitants of the corporate place or district, made by themselves or the authorized body, in distinction from the general law of the country or the statute law of the particular State.¹

¹ Willc. 73; 2 Kyd, 95, 98.

Definition and Nature of Ordinances or By-Laws.—In a case in Massachusetts, denying to towns in that state power, under the statute, to prohibit by ordinance the sale of intoxicating liquor, Mr. Chief Justice *Shaw* observed that the term "by-law" has a limited and peculiar meaning, and is used to designate such ordinances or regulations which a corporation, as one of its legal incidents, has power to make with respect to its own members and its own concerns. In respect to municipal and *quasi* corporations, this meaning has been somewhat extended, but even here the word is used to designate such ordinances and regulations as have reference to legitimate and proper municipal or corporate purposes. There is a broad distinction between the power of a public corporation to make "by-laws" and the general power to make "laws;" authority to make the former does not include the power to legislate upon general subjects. *Commonwealth v. Turner*, 1 Cush. 493. A *municipal by-law*, according to the definition of a distinguished English judge, is a rule obligatory over a particular district, not being at variance with the general laws of the realm, and being reasonable and adapted to the purposes of the corporation; and any rule or ordinance of a permanent character which a corporation is empowered to make, either by the common or statute law, is a by-law. *Per Parke, B.*, 19 Law J. (N. S.) Q. B. 135.

Resolutions and Ordinances Discriminated.—A *resolution* is an order of the council of a special and temporary character; an *ordinance* prescribes a permanent rule of conduct or government. *Blanchard v. Bissell*, 11 Ohio St. 96, 103, *per Scott, J.* Where the charter commits the decision of a matter to the council and is silent as to the mode, the decision may be evidenced by a *resolution*, and need not necessarily be by an *ordinance*. *State v. Jersey City*, 3 Dutch. (N. J.) 498, 1859. A *resolution* has ordinarily the same effect as an *ordinance*, as both are legislative acts. *Sower v. Philadelphia*, 35 Pa. St. 231,

§ 245. *Authority Delegated to Municipalities—Nature of Ordinances—Repeal.*—Although the proposition that the legislature of a State is alone competent to make laws is true, yet it is also settled that it is competent for the legislature to delegate to municipal corporations the power to make by-laws and ordinances,¹ which, when authorized,

1860; *Gas Company v. San Francisco*, 6 Cal. 190. Where the power to make ordinances and by-laws is general, and no form in which these shall be enacted or passed is prescribed, it was held that an *ordinance* containing a prohibition and annexing a penalty was valid, notwithstanding it purported by its terms to be a *resolution*. In substance it was an ordinance or regulation, and the form in which it was passed did not make it void. *Municipality v. Cutting*, 4 La. An. 335, 1849. By one section of the charter, the council was authorized to make “by-laws, ordinances, resolutions, and regulations,” and by another “by-laws and ordinances” were to be submitted to the mayor for his approval, and it was held that there was no such distinction as to require that “by-laws and ordinances” must, and “regulations and resolutions” need not, be submitted to the mayor, to be approved by him. *Kepner v. Commonwealth*, 40 Pa. St. 124. The words “regulation,” “resolution,” and “ordinance,” as used in the charter, defined by *Lourie*, C. J. *Ib.*

Mode of Exercising Power.—Where the power to do certain acts or pass certain ordinances is conferred upon the council, but the particular *mode* of exercising the power is not prescribed, this may be done by ordinance, and any mode may be adopted which does not infringe the charter or general law of the land. Thus, for example, power was given to a city “to levy and collect a special tax,” not specifying the mode of collection; held that an ordinance requiring the mayor to enforce the collection of the tax by suit, in the nature of an action for debt, was valid, as it did not violate the charter or the general law. *Cincinnati v. Gwynne*, 10 Ohio, 192; *Markle v. Akron*, 14 Ohio, 586, 1846. Prescribed mode essential. *Crosse v. Morristown*, 18 N. J. Eq. 305. *Post*, chap. XIX.

¹ *Perdue v. Ellis*, 18 Geo. 586, 1855; *St. Paul v. Coulter*, 12 Minn. 41, 1866; *Commonwealth v. Duquet*, 2 Yeates (Pa.), 493; *Hill v. Decatur*, 22 Geo. 203; *State v. Clark*, 8 Fost. (N. H.) 176, 1854; *Milne v. Davidson*, 5 Martin (La.) 586, 1827; *Marble v. Akron*, 14 Ohio, 586, 590, 1846; *Mayor, &c. v. Morgan*, 7 Martin (La. O. S.) 1, *per Martin*, J.; *Trigally v. Memphis*, 6 Coldw. (Tenn.) 382, 1869; *Metcalf v. St. Louis*, 11 Mo. 103, 1847. In *Strauss v. Pontiac*, 40 Ill. 301, 1866, the Supreme Court held that a provision in a town charter forbidding any person from doing a certain act, fixing the amount of fine, and prescribing the penalty, was a complete enactment of itself; that an ordinance to the same effect was void, and that a party could be prosecuted only under the charter, and not under the ordinance. In view of the general authority given in the same charter to make all ordinances necessary to carry into effect the powers granted in the charter, the correctness of this decision may admit of fair debate, although

have the force, as to persons bound thereby, of laws passed by the legislature of the State.'

§ 246. Ordinances being among the most important and solemn acts of a corporation, it is essential to their validity that they shall be *adopted by the proper body*, duly assembled, and in the manner prescribed by the charter. What is necessary to constitute a valid corporate meeting, and the manner of performing valid corporate acts, are subjects treated of in another chapter.' When the mode of enacting ordinances is prescribed, it must be pursued. Thus, if the charter provides that no by-law shall be passed unless introduced at a previous regular meeting, this is a restriction on the power, and must be observed; and, accordingly, an ordinance for opening a street was

it is undoubtedly true that no ordinance is necessary where the prohibition in the charter is complete, the penalty fixed, and the remedy prescribed. *Ashton v. Ellsworth*, 48 Ill. 299.

¹ *Heland v. Lowell*, 3 Allen, 407, 1862; *Church v. City, &c.*, 5 Cow. 538 1826; *St. Louis v. Boffinger*, 19 Mo. 13, 15, *per Gamble, J.*; *St. Louis v. Bank*, 49 Mo. 574; *Jones v. Ins. Co.*, 2 Daly (N. Y.) 307; *McDermott v. Board of Police*, 5 Abb. Pr. R. 422, 1857. A city council is "a miniature general assembly, and their authorized ordinances have the force of laws passed by the legislature of the state." *Per Scott, J.*, *Taylor v. Carondelet* (forfeiture clause in lease), 22 Mo. 105, 1855. In *Hopkins v. Mayor of Swansea*, 4 M. & W. 621, 640, Lord Abinger said: "The by-law has the same effect within its limits, and with respect to the persons upon whom it lawfully operates, as an act of parliament has upon the subjects at large." Valid ordinances of corporations are as binding on the corporators and inhabitants of the place as the general laws of the state upon the citizens at large. *Milne v. Davidson*, 5 Martin (La.) 586, 1827. And, therefore, it has been held, that contracts between the inhabitants of a city in violation of the express provisions of a valid ordinance of a municipal corporation are illegal, and cannot be enforced. *Milne v. Davidson* (lease of house for private hospital), 5 Martin (La.) 586, 1827; *Heland v. Lowell*, 3 Allen, 407, 1867; but compare *Baker v. Portland*, 58 Maine, 199; S. C., 10 Am. Law Reg. (N. S.) 559, and see Judge *Redfield's* note. The courts will not enjoin the passage of unauthorized ordinances, and will ordinarily act only when steps are taken to make them available. *Chicago v. Evans*, 24 Ill. 52, 1860; *Smith v. McCarthy*, 56 Pa. St. 359. But if a party is injuriously affected by an ordinance, he may have its validity judicially determined before it is attempted to be executed. *State v. Paterson*, 34 N. J. Law, 163. *State v. Jersey City*, *Id.* 31, 390, 1870.

² *Ante*, chap. X.

adjudged void, on the ground that the name of one of the commissioners was changed without laying the ordinance over until another meeting.¹ Municipal ordinances otherwise valid, may, like an act of the legislature, be adopted to take effect in future and upon the happening of a contingent event.²

§ 247. In the absence of required *record evidence of the passage of an ordinance*, it is not competent to establish its adoption by extrinsic testimony;³ but where unanimity is necessary to legal authority to make an order, and an order is entered, it will be presumed, when the contrary does not appear, that it was made with the required unanimity.⁴

§ 248. Courts will not, in general, inquire into the *motives of members* of the council in passing ordinances.⁵ But in Ohio, in a case where the legislature chartered a gas company, reserving the power of control, and subsequently empowered the city council to regulate the price of gas, the court considered the intention to be to limit the company to a fair and reasonable price, and that it must be fairly exercised, and if, in the colorable exercise of the power, a majority of the members, for a fraudulent purpose, combined to fix the price at a rate at which they knew it could not be made and sold without loss, their action would not

¹ *State v. Bergen*, 33 N. J. Law, 39, 1868, distinguished from *State v. Jersey City*, 2 Dutch. 448, where the variance was immaterial. Construction of similar restriction requiring previous publication. *In re Douglass*, 46 N. Y. 42; *Matter of N. Y., &c. School*, 47 N. Y. 556; *Dubuque v. Wooton*, 28 Iowa, 571.

² *Baltimore v. Clunet*, 23 Md. 449, 1865; *Railway Company v. Baltimore*, 21 Md. 93, 1863; *State v. Kirkley*, 29 Md. 85, 1868. *Ante*, sec. 23.

³ *Covington v. Ludlow*, 1 Met. (Ky.) 295, 1858. See *ante*, secs. 238, 204 n., 234; *post*, sec. 269.

⁴ *Lexington v. Headley*, 5 Bush (Ky.) 508, 1869; *Covington v. Boyle*, 6 Bush (Ky.) 204, 1869; *McCormick v. Bay City*, 23 Mich. 457, 1871; see *Steckert v. East Saginaw*, 22 Mich. 104; *post*, sec. 639.

⁵ *Freeport v. Marks*, 59 Pa. St. 253; *Buell v. Ball*, 20 Iowa, 282 (collateral action between third persons).

bind the company, and in such a case, their good faith, it was held, might be inquired into.¹

§ 249. Since a valid by-law never becomes obsolete, it remains in force until *repealed* by the legislature or the corporation. The power to make, includes the power to repeal. The repeal cannot operate retrospectively to disturb private rights vested under it.² Therefore, the legislature having authorized a religious corporation to establish a cemetery within the limits of a city, on obtaining the consent of the city, and such consent having been given, the city authorities cannot, after their consent has been acted upon, repeal the resolutions giving it, and enjoin the religious corporation from the use of the cemetery, unless, indeed, it is shown to be an actual nuisance, detrimental to the health of the city, in which case its police and governmental powers might doubtless be exercised.³

§ 250. *Mode of Conferring the Power—Construction of Grants of Authority.*—Municipal charters, or incorporating acts, are sometimes silent as to *the power to pass by-*

¹ *State v. Cincinnati Gas Company*, 18 Ohio St. 262, 1868, distinguished from *Fletcher v. Peck*, 6 Cranch, 87; *Bank v. United States*, 1 G. Greene, 558. The courts will not inquire, even on the complaint of the state, into the motives which governed members of the legislature in the enactment of a law, or allow to be shown, for the purpose of defeating the operation of the law, that it was passed by fraud, corruption, and bribery of the members. *Wright v. Defrees*, 8 Ind. 298; followed, *McCulloch v. State*, 11 *Ib.* 424, 431, 1858; *S. P. Sunbury, &c. Railroad Company v. Cooper*, 7 Am. Law Reg. 158, 1858.

² *Rex v. Ashwell*, 12 East, 22; 3 Term R. 198; *State v. City Clerk, &c.* 7 Ohio St. 355; *Stoddard v. Gilman*, 22 Vt. 568; *Pond v. Negus*, 3 Mass. 230; *ante*, chap. X.; *State v. Graves*, 19 Md. 351, 1862; *Bigelow v. Hillman*, 37 Maine, 52; *Reiff v. Conner*, 5 Eng. (Ark.) 241; *Road Case*, 17 Pa. St. 71, 75. An act changing an incorporated town into a city does not of itself repeal pre-existing ordinances. *Per Strong, J., Trustees of Academy v. Erie*, 31 Pa. St. 515, 1858. *Ante*, sec. 52; note.

³ *New Orleans v. St. Louis Church*, 11 La. An. 244, 1856, distinguished from *Presbyterian Church v. Mayor*, 5 Cow. 538; *Musgrove v. Catholic Church*, 10 La. An. 431. *Ante*, sec. 61. The *repeal* of an ordinance *puts an end to a pending prosecution* under the repealed ordinance, unless there be a saving clause. The contrary rule as to state statutes held not to apply to by-laws or ordinances. *Naylor v. Galesburg*, 56 Ill. 285, 1870.

laws or ordinances, and where this is the case, the municipal body has the power, incidental to all corporations, to enact appropriate by-laws. Occasionally, the charter or incorporating act, without any specific enumeration of the purposes for which by-laws may be made, contains a general and comprehensive grant of power to pass all such as may seem necessary to the well-being and good order of the place. More frequently, however, the charter or incorporating act authorizes the enactment of by-laws in certain specified cases and for certain purposes; and after this specific enumeration a general provision is added, that the corporation may make any other by-laws or regulations necessary to its welfare, good order, &c., not inconsistent with the constitution or laws of the state. This difference is essential to be observed, for the power which the corporation would possess under what may, for convenience, be termed, "the general welfare clause," *if it stood alone*, may be limited, qualified, or, when such intent is manifest, impliedly taken away by provisions specifying the particular purposes for which by-laws may be made. It is clear that the general clause can confer no authority to abrogate the limitations contained in special provisions. When there are both special and general provisions, the power to pass by-laws under the special or express grant can only be exercised in the cases, and to the extent, as respects those matters, allowed by the charter or incorporating act; and the power to pass by-laws under the general clause does not enlarge or annul the power conferred by the special provisions in relation to their various subject matters, but gives authority to pass by-laws, reasonable in their character, upon all other matters within the scope of their municipal authority, and not repugnant to the constitution and general laws of the state.¹ And it has been very properly held,

¹ State v. Ferguson, 33 N. H. 424, 1856, where this subject is ably treated in a judgment delivered by Mr. Justice Foster, holding a by-law of the city of Concord, in relation to the sale of intoxicating liquor, invalid as contravening the special provisions of the charter, and therefore not sustainable under the general welfare clause of the charter.

"The power to make by-laws, when not expressly given, is *implied* as an incident to the very existence of a corporation, but in the case of an express grant of the power to enact by-laws limited to certain specified

that a special grant of power to a municipal corporation to adopt ordinances on enumerated subjects connected with municipal concerns, is in addition to the incidental power of the corporation.¹

§ 251. *Ordinances cannot enlarge or change the Charter or Statute.*—Since all of the powers of a corpora-

cases and for certain purposes, the corporate power of legislation is confined to the objects specified, all others being excluded by implication." *Per Sawyer, J., arguendo*, in *State v. Ferguson*, 33 N. H. 424, 430, 1856; citing 2 Kyd on Corp. 102; Angell & Ames on Corp. 177; and *Child v. Hudson's Bay Company*, 2 P. Wms. 207. The true rule in such cases *may*, perhaps, be correctly expressed to be, that the enumeration of special cases does not, unless the intent be apparent, exclude the implied power any further than necessarily results from the nature of the special provisions: *Heisembrittle v. Charleston*, 2 McMullen, 238; *Wadleigh v. Gilman*, 3 Fairf. (Maine) 408; *State v. Clark*, 8 Foster (N. H.) 176, and comments in 33 N. H. 432; *State v. Freeman*, 38 N. H. 426; *Commonwealth v. Turner*, 1 Cush. (Mass.) 493; *Collins v. Hatch*, 18 Ohio, 528. See *New Orleans v. Philipi* (taxation), 9 La. An. 44.

In Georgia, the Superior Courts adopt the following as the true rule for ascertaining *the extent of the power* of a city to pass ordinances. "The city council is restrained to such matters, whether specially enumerated or included under general grant, as are indifferent in themselves, such matters as are free from constitutional objection and have not been the subject of general legislation; or, as it is expressed in the charter, are not repugnant to the constitution or laws of the land." *Dubois v. Augusta* (health ordinance), *Dudley* (Geo.) Rep. 30, 1831; *Williams v. Augusta* (powder ordinance), 4 Geo. R. 509, 514, 1848. Power to pass *necessary* by-laws is incidental, but this power is limited not only by the terms, but the spirit and design, of the charter, and the general principles and policy of the common law. *Taylor v. Griswold*, 2 Green (N. J.) 222, 1834; *Mount Pleasant v. Breeze*, 11 Iowa, 399, 1860, *per Wright, J.*

¹ *State v. Morristown*, 33 N. J. Law, 57, 1868. *Depue, J.*, in his opinion, distinguishes such a case from *Norris v. Stapa, Hobart*, 210, where the corporation was created by the Crown, and where it was held that a special clause in the letters patent authorizing the corporate body (a fellowship of weavers) to make by-laws, did not add to implied powers, and that its by-laws were subject to the general law of the realm and subordinate to it. "But," he adds, "a special grant of power to a municipal corporation is an entirely different thing; it is a delegation of authority to legislate by ordinance on the enumerated subjects, and does add to the powers incident to the creation of the corporation. The numerous instances, in our own state, of the grant of such powers in relation to the opening and improvement of streets, the making of sewers, and the assessment of taxes, afford illustrations of this distinction." *Ib.* 62.

tion are derived from the law and its charter, it is evident that *no ordinance or by-law of a corporation can enlarge, diminish, or vary, its powers.*¹ A similar rule obtains in England, where it is held, that neither the king's charter nor any by-law can introduce an alteration in rules which have been prescribed to a corporation by an act of parliament.² By-laws are, in their nature, strictly local, and subordinate to the general laws.

§ 252. *Ordinance Need not Recite Authority to Pass it.*—It is not essential to the validity of an ordinance executing powers conferred by the legislature, that it should state the power in execution of which the ordinance is passed. If it state no particular power as its basis, it will be judicially regarded as emanating from that power which would have warranted its passage. If two such powers

¹ Thompson v. Carroll, 22 How. 422, 1859; Andrews v. Insurance Company, 37 Maine, 256, 1854; Thomas v. Richmond, U. S. Supreme Court, Dec. T., 1871, 12 Wall. 349. "A power vested by legislation in a city corporation, to make by-laws for its own government and the regulation of its own police, cannot be construed as imparting to it the power to repeal the [general] laws in force, or to supersede their operation by any of its ordinances. Such a power, if not expressly conferred, cannot arise by mere implication, unless the exercise of the power given be inconsistent with the previous law, and does necessarily operate as its repeal *pro tanto*. Nor can the presumption be indulged, that the legislature intended that an ordinance passed by the city should be superior to, or take the place of, the general law of the state upon the same subject." Simpson, C. J., March v. Commonwealth, 12 B. Mon. 25, 29, 1851. "Huckster" means a petty dealer or retailer of small articles of provisions, &c., and an ordinance cannot enlarge the ordinary meaning so as to embrace "any person not a farmer or butcher who should sell, or offer for sale, any commodity not of his own manufacture," and subject such person to a penalty; it not being, says Ranney, J., "part of the franchise of municipal corporations to change the meaning of English words." Mayor v. Cincinnati, 1 Ohio St. 268, 272, 1853.

² Rex v. Miller, 6 Term R. 277; Rex v. Barber Surgeons, 1 Ld. Raym. 585. It has even been said that the general assembly cannot authorize a municipal corporation to repeal, by ordinance, a statute of the state. Haywood v. Mayor, &c., 12 Geo. 404, *per Lumpkin*, J. But it may provide that on the passage of an ordinance of a certain character, the state law on the subject shall not be in force in the corporate limits. State v. Binder, 38 Mo. 450. *Post*, sec. 757.

exist, it may be imputed to either, in conformity to which its provisions and pre-requisites show that it has been adopted. If, in these respects, in accordance with both, no injustice can result in regarding it as the offspring of both, or either of the powers.¹

§ 253. *Must be Reasonable and Lawful.*—In England, the subjects upon which by-laws may be made were not usually specified in the king's charter, and it became an established doctrine of the courts that every corporation had the implied or incidental right to pass by-laws, but this power was accompanied with these limitations, namely, that *every by-law must be reasonable*, not inconsistent with the charter of the corporation, nor with any statute of parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property.² In this country the courts have often affirmed the general incidental power of municipal corporations to make ordinances, but have always declared that ordinances passed in virtue of the implied power must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state.³

¹ *Per Dorsey, C. J., Methodist P. Church v. Baltimore*, 6 Gill (Md.) 391, 1848. Under power to pass an ordinance if found *necessary*, the *necessity* for its enactment, being implied from its mere passage, need not be recited in the ordinance, nor averred in proceedings to enforce it. *Stuyvesant v. Mayor, &c. of New York*, 7 Cow. 588; *S. P. Young v. St. Louis*, 47 Mo. 492, 1871. But the charter may be *imperative* in requiring the necessity to be expressed by ordinance or resolution: so held in *Hoyt v. East Saginaw*, 19 Mich. 39, 1869. So, in England it is not necessary that the preamble to a by-law should state the reasons for making it. *Rex v. Harrison*, 3 Burr. 1328. See, also, *Grierson v. Ontario*, 9 Up. Can. Q. B. 623; *Fisher v. Vaughan*, 10 Up. Can. Q. B. 492.

² *Sutton's Hospital Case*, 10 Rep. 31 a; *Feltmakers v. Davis*, 1 Bos. & P. 98, 100; *Norris v. Stops*, Hob. 211; *Rex v. Maidstone*, 3 Burr. 1837; *Com. Dig. Franch. F. 10*; *London v. Vanacre*, 1 Ld. Raym. 496; 2 Kyd, chap. IV. sec. 10, p. 95, and cases cited; *Bac. Abr. tit. By-Law*.

³ *Must be Reasonable.* *Kip v. Patterson*, 2 Dutch. (N. J.) 298; *Commissioners v. Gas Co.*, 12 Pa. St. 318, 1859; *Fisher v. Harrisburg*, 2 Grant (Pa.) Cases, 281, 1854; *Commonwealth v. Robertson*, 5 Cnsh. 438, 1850; *Waters v. Lecch*, 3 Ark. 140; *Mavor v. Winfield*, 3 Humph. (Tenn.) 767, 1848;

§ 254. *Must not be Oppressive.*—The principle of law, that ordinances passed under the general authority to enact all such as will be necessary, must be reasonable, or they may be void, is well illustrated by a case in Pennsylvania.¹ A municipal corporation passed two ordinances in relation to a gas company—a private corporation, with a special charter authorizing the construction and maintenance of suitable gas works within the limits of the municipal corporation, and the use of the streets for the laying down of pipes. The first ordinance prohibited the gas company from opening paved streets from December to March in each year, for the purpose of laying gas mains. This ordinance the court considered to be reasonable, in view of the difficulty of repairing the paved streets during the winter months. And the other ordinance prohibited the gas company from opening a paved street at any time, for the purpose of laying pipes from the main to the opposite side of

Commonwealth v. Steffee, 7 Bush (Ky.) 161, 1870; People v. Throop, 12 Wend. 183, 186, 1834; Mayor v. Beasley, 1 Humph. 232, 1839; State v. Freeman, 38 N. H. 426, 1859; White v. Mayor, &c., 2 Swan (Tenn.) 364, 1852; Pedrick v. Bailey, 12 Gray (Mass.) 161; Dunham v. Rochester, 5 Cow. 462; Clason v. Milwaukee, 30 Wis. 316, 1872.

Must not conflict with the charter or statute, or be repugnant to fundamental rights. Dubois v. Augusta (health ordinance), Dudley (Geo.) R. 30, 1831; Williams v. Augusta (powder ordinances), 4 Geo. 509, 1348; Adams v. Mayor, &c. (liquor statute), 29 Geo. 56; Taylor v. Griswold, 2 Green (N. J.) 222, 1834; New Orleans v. Philpi (taxation), 9 La. An. 44; Perdue v. Ellis (liquor traffic), 18 Geo. 586; Haywood v. Mayor, 12 Geo. 404; Paris v. Graham (tax on dram-shops), 33 Mo. 94; St. Louis v. Cafferata, 24 Mo. 94; St. Louis v. Benton, 11 Mo. 61; Carr v. St. Louis (fee of officers), 9 Mo. 1845; Marietta v. Fearing (estrays animals), 4 Ohio, 427, 1831; Collins v. Hatch (animals at large), 18 Ohio, 532, 1849; Mayor, &c. of New York v. Nichols (inspection laws), 4 Hill, 209, 1843; Commonwealth v. Turner (liquor traffic), 1 Cush. 493, 1848; Phillips v. Wickam, 1 Paige, 590; Howard v. Savannah, T. Charlt. R. 173; Smith v. Knoxville, 3 Head (Tenn.) 245, 1859; Cowen v. West Troy, 43 Barb. 48, 1864; Petersfield v. Vickers, 3 Coldw. (Tenn.) 205; City Council v. Benjamin, 2 Strob. (South Car.) 251; City Council v. Ahrens, *Id.* 241; Heisembrittle Ads. v. City Council, 2 McMull. (South Car.) 233; City Council v. Goldsmith, 2 Speer (South Car.) 435; State v. Welch, 36 Conn. 215. An ordinance prohibiting heavy *awnings* over sidewalks, without consent of municipal authorities, is reasonable and valid. Pedrick v. Bailey, 12 Gray, 161.

¹ Commissioners of North Liberties v. Gas Company, 12 Pa. St. 313, 1849.

the street. The court say: "The effect of this ordinance is, to compel the company to construct two mains, one on each side of the street, instead of one, thereby materially increasing the expense to the company, and consequently enhancing the price of gas to the inhabitants of the district." And this ordinance was declared to be void.

§ 255. Courts will declare void ordinances that are *oppressive* in their character. Thus, the Supreme Court of Tennessee, in a judgment which reflects credit upon the tribunal that pronounced it, declared void an ordinance of the city of Memphis which ordered the arrest, imprisonment, and fine of all free negroes who might be found out after ten o'clock at night, within the limits of the corporation.¹

§ 256. *Must be Impartial, Fair, and General.*—As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and if done by another not so, ordinances which have this effect cannot be sustained. *Special and unwarranted discrimination*, or unjust or oppressive interference in particular cases is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation.²

¹ Mayor v. Winfield, 8 Humph. (Tenn.) 767, 1848. The oppressiveness and inequality, alleged to invalidate a by-law, must be made apparent to the court. Mayor v. Beasley, 1 Humph. (Tenn.) 232, 1839; St. Louis v. Weber, 44 Mo. 547, 1869. A by-law prohibiting *swine running at large* in a city is presumptively reasonable as a sanitary or police regulation. Commonwealth v. Patch, 97 Mass. 221; Commonwealth v. Bean, 14 Gray, 52.

² Russ v. Mayor, &c. of New York, 12 N. Y. Leg. Obs. 38; White v. Mayor, 2 Swan (Tenn.) 364, 1852; De Ben v. Girard, 4 La. An. 30; Chicago v. Rumpff, 45 Ill. 90; Mayor, &c. of Hudson v. Thorne, 7 Paige, 261. Ordinances should be general, or, at all events, not discriminating in their operation. They may, it is said, impose fines on persons violating their provisions within the corporation or within a designated district therein, or in a certain street; but an ordinance naming one individual and directing him to do certain acts with respect to a building alleged to be a nuisance, and in default of compliance, imposing a fine of a specific amount upon him, was held to be unreasonable, contrary to common right, and void.

§ 257. *May regulate, but not Restrain, Trade.*—In *England*, certain customs prevail in prescriptive corporations restrictive of freedom of trade and against common right. Such customs, from long usage and unknown origin, are regarded in the light of regulations prescribed by a charter which is supposed to have existed, but is lost. Such customs, while not favored by the English courts, are yet held legal, but must be incontrovertibly established. But by the Municipal Corporations Act of 1835 (5 & 6 Will. IV. chap. LXXVI. sec. 14),¹ exclusive rights of trading have been abolished, and it is enacted, “that notwithstanding such custom or by-law [to the contrary], every person in any borough may keep any shop for the sale of all lawful wares and merchandise, by wholesale or retail, and use every lawful trade, occupation, mystery, and handicraft, for hire, gain, sale, or otherwise, within any borough.”

§ 258. In *this country* corporations derive all their powers from legislative acts of comparatively modern date, and prescriptive customs, in restraint of trade or against common right, are unknown. No inconsiderable portion of the cases in the old books in *England* relate to these customs, their validity and mode of proof, but they are, in the main, inapplicable to the present period and to the institutions in this country, where freedom in the choice and pursuit of all occupations never has been denied. The inapplicability of the English decisions is noticed by Mr. Justice *Dewey* in delivering the opinion of the Supreme Court of

Municipality v. Blineau, 3 La. An. 688, 1848. Compare *Bozant v. Campbell*, 9 Rob. (La.) 411, 1845, where, without repealing an ordinance prohibiting private hospitals, the grant of permission to one or more individuals to erect such hospitals, was sustained. And see, also, *Commonwealth v. Goodrich*, 13 Allen, 545, where a municipal regulation, limited in its charter, was considered valid. In exercising its power to require adjacent lot owners to make local improvements, the corporation, it has been held in *Tennessee*, must not act in a partial and oppressive manner; therefore it cannot select particular individuals by name, and require them to construct pavements or local improvements in front of their lots, and omit others in the same improvement district, if this be done without good cause or reason for the distinction. *White v. Mayor, &c.*, 2 Swan (Tenn.) 364, 1852. *Post*, sec. 638.

¹ *Ante*, chap. III. sec. 16 and note.

Massachusetts in an important case involving the validity of an ordinance of the city of Boston regulating the use of hackney coaches and other vehicles within the city. He observes, that "in the arguments addressed to the court, the question was somewhat discussed as to the power incident to municipal corporations to create by-laws of the character here adopted; and a reference was made to various cases in the English courts, where questions of this nature had arisen. Upon examination of those cases, they will be found less important and less satisfactory as guides here, inasmuch as it is quite obvious that in many of them, and particularly those where the ordinance seemed most questionable as not being within the ordinary exercise of municipal authority, the by-laws were sustained upon the ground of ancient and long-continued usage, ripening into a prescriptive right on the part of the municipal corporation." But "no such ground," he adds, "can be urged here, and the present ordinance, if sustained at all, must be shown to be authorized by the express provision of the charter, or be derived as an incidental power resulting from its incorporation as a city, or be found in some general or special statute."¹

¹ Commonwealth v. Stodder, 2 Cush. 562, 568, 1848. See as to English decisions, remarks of *Rhodes*, J., in *Herzo v. San Francisco*, 83 Cal. 134, 145, 1867. In the case first cited the court decided that the business of *carrying persons for hire* from town to town, in stage coaches and omnibuses, is not so far a territorial or local occupation as will authorize one city, unless it has express and direct authority so to do from the legislature, to pass an ordinance requiring the inhabitants of other towns to obtain from it a license before exercising that employment in carrying persons to or from it. Such an ordinance was considered to be an unnecessary restraint upon business, and is not binding upon citizens of other places. The court does not question the right of the city, by reasonable by-laws, to require *inhabitants*, whose business is local and carried on within the city, to obtain a license before exercising certain employments. *Per Dewey*, J., 2 Cush. 562, 575; see also *Napman v. People*, 19 Mich. 352, 1869; *Barling v. West*, 29 Wis. 307; *Hayes v. Appleton*, 24 Wis. 542.

Whenever a by-law seeks to *alter a well settled* and fundamental principle of the common law, or to establish a rule interfering with the rights of individuals or the public, the power to do so must come from plain and direct legislative enactment. *Taylor v. Griswold*, 2 Green (N. J.) 222, 1834. *Ante*, sec. 55, and note.

§ 259. *Must not Contravene Common Right.* — An ordinance cannot legally be made which contravenes a common right, unless the power to do so be plainly conferred by legislative grant; and in cases relating to such a right, authority to regulate conferred upon towns of limited powers, has been held not necessarily to include the power to prohibit.¹ Thus, in Connecticut, it is held that every one has, presumptively, a common law right to fish in navigable rivers, and that though every town may, by statute, have the power to make by-laws to *regulate* fisheries of clams and oysters within its limits, yet this power does not authorize a by-law *prohibiting all persons*, except its own inhabitants, from taking shell-fish in a navigable river, within the limits of such town; such a by-law, being in contravention of a common right, is void.²

§ 260. But there is, however, *no common right* to do that which, by a valid law or ordinance, is prohibited; and hence courts will not declare an authorized ordinance void because it prohibits what otherwise might lawfully be done. In discussing the subject, Mr. Justice *Evans* illustrates it in this wise: "If there was no law interfering, the butcher might kill his beeves and hogs in the street. If the butcher could do it any man might, and it might, therefore, be said to be a common right; but when the law prohibited it, it was no longer a common right. A legal restraint may be imposed on a few for the benefit of the many."³

§ 261. *Validity is for the Court, and not the Jury. to Determine.* — Whether an ordinance be reasonable and consistent with the law or not, is a question for the court, and not the jury, and evidence to the latter on this subject is inadmissible. But in determining this question the court will have to regard all the circumstances of the particular

¹ Taylor v. Griswold, 2 Green (N. J.) 222, 1834.

² Hayden v. Noyes, 5 Conn. 391, 1824; Peck v. Lockwood, 5 Day (Conn. 22; Willard v. Killingworth, 8 Conn. 247; Clason v. Milwaukee, 80 Wis. 316. *Ante*, sec. 55.

³ *Per Evans, J.*, in City Council v. Ahrens, 4 Strob. (South Car.) Law, 241, 257, 1850; City Council v. Baptist Church, *Ib.* 306, 310; Peoria v. Calhoun, 29 Ill. 317, 1862; St. Paul v. Coulter, 12 Minn. 41, 1866.

city or corporation, the objects sought to be attained, and the necessity which exists for the ordinance. Regulations proper for a large and prosperous city might be absurd or oppressive in a small and sparsely populated town, or in the country. An unreasonable by-law is void.¹

§ 262. *Legislative Authority to Adopt Unreasonable Ordinances.*—Where the legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the constitution, an ordinance passed

¹ Bacon Abr. tit. By-Law; Commonwealth v. Worcester, 8 Pick. 462, 1862; Paxson v. Sweet, 1 Green (N. J.) 196, 1832; Vandine, Petitioner, &c., 6 Pick. 187, 1828; Boston v. Shaw, 1 Met. 130, 135, 1840; Austin v. Murray, 16 Pick. 121, 125, 1834; Hudson v. Thorne, 7 Paige, 261; Commonwealth v. Stodder, 2 Cush. 562, 575, 1848; Commonwealth v. Gas Company, 12 Pa. St. 318. Dunham v. Rochester, 5 Cow. 462, 465, 1826; Buffalo v. Webster, 10 Wend. 100.

“Where the municipal legislature has authority to act, it must be governed, not by our discretion, but by its own; and we shall not be hasty in convicting them of being unreasonable in the exercise of it.” *Per Lowrie, J., Fisher v. Harrisburg*, 2 Grant (Pa.) Cas. 291, 1854. *S. P. St. Louis v. Weber*, 44 Mo. 547. “The courts,” says *Dewey, J.*, “doubtless have the power to deny effect to a by-law obnoxious to the objection that it is unreasonable. It is, however, a power to be cautiously exercised,” especially where the question is a practical one—for example, the length of time which ought to be allowed to vehicles to remain in the street, and as to which the city authorities, it is to be presumed, can judge better than the court. *Commonwealth v. Robertson*, 5 Cush. 438, 442, 1850. See, also, *Vintners v. Passey*, 1 Burr. 289; *Workingham v. Johnson*, Cas. Temp. Hardw. 285; *Poulter’s Co. v. Phillips*, 6 Bing. (N. C.) 314; *St. Paul v. Coulter*, 13 Minn. 41; *Commonwealth v. Patch*, 97 Mass. 221.

The doctrine of the text that the validity of a by-law is in all cases a question for the court and that evidence to the jury is inadmissible, has been denied by the Supreme Court of Wisconsin which, in *Clason v. Milwaukee*, 80 Wis. 316, 1872 (involving the validity of an ordinance to protect the harbor, and also the city, from inundation by preserving the shore or beach), considered it to be no violation of principle, in a case where the reasonableness of the ordinance depended upon extrinsic facts, to submit testimony to the jury bearing upon the reasonableness of the requirements of the ordinance. But the argument of the counsel for the city that this view makes the same by-law “valid in one case and invalid in another, according to the varying weight of testimony and the varying views of juries” seems unanswerable, and the text states probably the true doctrine. See *Glover on Corp.* 297, and cases in this note.

pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it unreasonable. But where the power to legislate on a given subject is conferred, but the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid.¹

§ 263. *Must be Consistent with Public Legislative Policy.*—The rule that a municipal corporation can pass no ordinance which conflicts with its charter or any general statute in force and applicable to the corporation has been before stated. Not only so, but it cannot, in virtue of its incidental power to pass by-laws, or under any general grant of that authority, adopt by-laws which infringe the spirit or are repugnant to the policy of the state as declared in its general legislation. This principle is well exemplified by a case in Ohio,² in which incorporated towns were, by statute, prohibited from subjecting stray *animals* owned by persons not residents of such towns to their corporation ordinances. It was held that an ordinance operating, not on the animals but on the non-resident *owner*, in the shape of a penalty, violated the spirit of the statute, and was void. So, in a later case in the same state, it was shown that the general policy of the state was to allow animals to run at large; and it was ruled that a municipal corporation with power to pass “all by-laws deemed necessary for the well regulation, health, cleanliness, &c.,” of the borough, and with power to “abate nuisances,” had no authority to pass a by-law restraining cattle from running at large, such a by-law being in contravention of the general law of the state.³

¹ *Peoria v. Calhoun*, 29 Ill. 317, 1862; *St. Paul v. Coulter*, 12 Minn. 41, 1866.

² *Marietta v. Fearing*, 3 Ohio, 427, 1881.

³ *Collins v. Hatch*, 18 Ohio, 428, 1849. But in Illinois it has been decided that a town, authorized by its charter to declare what should be nuisances, and to provide for the abatement thereof by ordinance, may

§ 264. The general statutes of the state abolished the system of inspecting hay, and, in the place of it, the seller was required to prepare the article for market in a particular manner at the peril of being subjected to certain designated penalties. In other words, he was at liberty to dispose of his hay without inspection if he chose to do so. Under these circumstances, it was decided that a city ordinance prohibiting the sale of pressed hay *without inspection* was void, because it *conflicted with the laws of the state* upon the same subject.¹

Of the Signing, Publication, and Recording of Ordinances.

§ 265. *Signing, Publication, and Recording.*—When ordinances are required to be published before they shall go into effect, this requirement is essential, and the publication must be in the designated mode. Until such publication be made, or until they have gone into operation, no penalty

pass an ordinance declaring swine running at large within the corporation to be nuisances, and providing for the taking up of the same, &c., and this though under the laws of the state the owners of stock may lawfully allow it to run at large upon the common—the court regarding the power named in the charter as abridging or limiting any right of common which might otherwise exist. *Roberts v. Ogle*, 30 Ill. 459, 1863. By-laws which contravene the policy of the general statutes of the state, by undertaking to punish acts which those statutes authorize, are void. *Canton v. Nist*, 9 Ohio St. 439, holding void a by-law, which, disregarding the statutory exceptions of cases of necessity, charity, &c., prohibited the opening of shops for business on Sunday. Followed, *Thompson v. Mount Vernon*, 11 *Ib.* 688, adjudging an ordinance to be invalid because inconsistent with the liquor law of the state. And see *Adams v. Mayor, &c.*, 29 Geo. 56; *Sill v. Corning*, 1 E. P. Smith (N. Y.) 297; *Cincinnati v. Gynne*, 10 Ohio, 290; *Wood v. Brooklyn*, 14 Barb. 425; *Markle v. Akron*, 14 Ohio, 586; *Thomas v. Richmond*, U. S. Sup. Ct. Dec. Term, 1870, 12 Wall. 349. But a corporation may, in some cases, consistently with general law, further regulate by ordinance subjects already regulated by statute. *Huddleson v. Ruffin*, 6 Ohio St. 604; *Rogers v. Jones*, 1 Wend. 237; *State v. Welch*, 36 Conn. 215, 1869.

¹ *Mayor, &c., of New York v. Nicholls*, 4 Hill (N. Y.) 209, 1843. Compare, *Mayor v. Hyatt*, 3 E. D. Smith, 156; *Rogers v. Jones*, 1 Wend. 237. Construction of power to appoint weighmasters. *Hoffman v. Jersey City*, 84 N. J. Law, 172, 1870.

can be enforced under them.¹ Whether the mayor's signature is essential to the validity of an ordinance depends upon the charter, but unless made essential, such provisions, where the ordinance is duly enacted, have sometimes been regarded as directory.*

§ 266. Where *alternate modes* of publication of a by law are allowed by statute, and the statute requires the *corporation* to direct which mode shall be adopted, a publication made by order of the clerk, without direction from, or selection of, the mode having been made by the corporation, is not valid.*

§ 267. A municipal charter required every ordinance to

¹ Barnett v. Newark, 28 Ill. 62, 1862; Conboy v. Iowa City, 2 Iowa, 90, 1855; Higley v. Bunce, 10 Conn. 567, 1835. Failure to publish ordinance held not to affect validity of bonds issued under a subsequent act authorizing the corporation to incur a debt. Amey v. Allegheny City, 24 How. 364; Clark v. Janesville, 10 Wis. 136, 1859; State v. Newark, 1 Vroom (N. J.) 303; People v. San Francisco, 27 Cal. 655.

* Blanchard v. Bissell, 11 Ohio St. 96, 101, 103, 1860; Striker v. Kelly 7 Hill, 9; Elmendorf v. Mayor of New York, 25 Wend. 693. See, however Conboy v. Iowa City, *supra*; State v. Newark, 1 Dutch. 399; State v. Hudson, 5 Dutch. 475; Kepner v. Commonwealth, 40 Pa. St. 124; State v. Jersey City, 1 Vroom, 93; Creighton v. Manson, 27 Cal. 613; Taylor v. Palmer, 31 Cal. 241; Dey v. Jersey City, 19 N. J. Eq. 412; Gas Company v. San Francisco, 6 Cal. 190. See *ante*, chapter on Corporate Meetings, sec. 231. Signing *minutes* not equivalent to signing resolution, when latter is essential. Graham v. Carondelet, 33 Mo. 262, 1862. When to be signed. Miles v. Bough, 3 Gale & D. 119; Inglis v. Railway Company, 16 Eng. Law & Eq. 55. A legislative provision requiring the *presiding officer* of the council to *sign* all ordinances, is directory in its nature. If regularly passed, an ordinance is valid, though not thus authenticated. It is, of course, competent for the legislature to make the signature an essential condition of validity. Blanchard v. Bissell, 11 Ohio St. 96, 101, 103, 1860; Fisher v. Graham, 1 Cin. (O.) 113, 1870. *Ante*, sec. 231. See State v. Newark, 1 Dutch. (N. J.) 399. *Ante*, sec. 209, note.

* Higby v. Bunce (restraining cattle) 10 Conn. 435; S. C., *Ib.* 567, 1835. The language of the statute was this: "Such by-laws shall not be in force until published four weeks in a newspaper printed in such town, or in the town nearest to such town in which a newspaper is printed, or in some other newspaper generally circulated in the town where such by-law is made, as the town shall direct." Rev. 1821, p. 458. Held, that the town must point out one of the three descriptions of newspapers in which the by-law should be printed. *Ib.*

be published for the space of *twenty days* in at least one newspaper before it should go into effect; and it was held that an ordinance would go into force in twenty days after its publication in the first number of the paper; that twenty days need not intervene between the first and last insertions; that it is clearly sufficient if it be published in each number of the paper issued within the twenty days, and probably sufficient if there is but one insertion, twenty days after which the ordinance will go into effect.¹

§ 268. A charter provided that no ordinance should be in force until published in some newspaper of the place, and also declared that ordinances should be sufficiently proved in any court (among other modes) by a printed copy taken from the newspaper or printed pamphlet in which the same had been published, provided the same purports to have been done by authority of the corporation. Under this provision, the production of a newspaper published in the town, containing what appears as an ordinance, with a caption, "Published by Authority," duly signed, *is evidence* of the existence and adoption of the ordinance.²

§ 269. A provision in a statute changing an incorporated town into a city, that the existing town ordinances shall remain in force provided they shall be *recorded* within four months thereafter, is merely directory, and such ordinances are valid though not recorded within the designated period.³ Nor is it a valid objection to a municipal ordinance that it is recorded in print (being printed and pasted in the proper book), and not in manuscript.⁴

¹ *Hoboken v. Gear*, 3 Dutch. (N. J.) 165, 1859. Where a city is required to *promulgate* its ordinances, it is sufficient to publish them in the newspaper in which the ordinances are *usually* published, though there may be other newspapers within the city. *Truchelut v. City Council*, 1 Nott & McC. (South Car.) 227, 1818.

² *Block v. Jacksonville*, 36 Ill. 301, 1865. See *Pendegast v. Peru*, 30 Ill. 51. Proof of publication under special charter provision. *President, &c. v. O'Malley*, 18 Ill. 407.

³ *Trustees of Academy v. Erie*, 31 Pa. St. 515, 1858. *Amey v. Allegheny City*, 24 How. 364. See Chapter on Corporate Records and Documents, *ante*.

⁴ *Ewbanks v. Ashley*, 36 Ill. 177, 1864. *Parol evidence of resolutions is*

Of the Power to Impose Fines, Penalties, and Forfeitures.

§ 270. *Common Law Principles Adopted.*—That by-laws or ordinances may not be inoperative or useless, it is necessary that some penalty should be annexed to the breach of them ; and it is settled in England, in accordance with the principles of Magna Charta, that without the express sanction of parliament no by-law can be enforced by disfranchisement of the offender, or by his imprisonment, or by forfeiture of his goods or property. Under incidental power to pass by-laws, a corporation may, in England, annex pecuniary penalties of a certain fixed and reasonable character, but without express authority given by a statute, the only penalty it can prescribe is a pecuniary one, usually called a fine. Therefore, in the absence of a statute or special custom justifying it, a by-law cannot give a power of distress and sale of the goods of the offender, since such a power is contrary to the common law. And where a corporation is empowered to enforce its by-laws, in a special manner, as by fine, it is limited to the manner prescribed. These safe, salutary, and enlightened principles of law have been recognized by the American courts as applicable to the ordinances of our municipal corporations, as the cases to which reference will be made fully show.

§ 271. By the *Municipal Corporations Act*, the subject of by-laws and their penalties is regulated. It is declared, “ that it shall be lawful for the council of any borough to make such by-laws as shall to them seem meet for the good rule and government of the borough, and for the prevention and suppression of all such nuisances as are not already punishable in a summary manner by virtue of an act in force throughout such borough, *and to appoint, by such by-laws, such fines* as they shall deem necessary for the prevention and suppression of such offences ; provided

competent where the charter does not require them to be recorded, and no record thereof has been made. *Darlington v. Commonwealth*, 41 Pa. St. 68. See *ante*, sec. 247.

that no *fine*, to be so appointed, *shall exceed the sum of five pounds*, and that no such by-law shall be made, unless at least two-thirds of the whole number of the council shall be present.”¹ Respecting the fines mentioned in this section, Mr. Rawlinson suggests the inquiry whether it be necessary or not that the *exact amount* of each fine should be mentioned in the by-law, the limit, to wit, 5*l.*, being fixed by the act. It is contended, he observes, by some persons, that the amount may be left open, and that a by-law enacting that the offence shall be punishable by a fine not less than 10*s.* and not exceeding 5*l.* would be valid. This would be convenient, but some have doubted whether the corporation could enforce it by the usual common law remedies, viz: by an act of debt or assumpsit. It is believed, he adds, that by-laws have invariably fixed the exact sum, but, nevertheless, it would seem that a fine of 5*l.*, with power to the mayor or other officer to reduce it to any sum not exceeding a specified amount, would be good.² In this country, the practice, if not general, is at least not uncommon, to prescribe limits to fines, and allow them to be imposed within those limits, at the discretion of the magistrate or court intrusted with jurisdiction to hear complaints for breaches of municipal ordinances.

§ 272. *Implied Power to Annex Pecuniary Penalties.*—Since an ordinance or by-law without a penalty would be nugatory,³ municipal corporations have an implied power to provide for their enforcement by reasonable and proper fines against those who break them.⁴ So the right to make

¹ 5 & 6 Will. IV. chap. LXXVI. sec. 90. *Ante*, sec. 16, and note.

² Rawlinson on Corp. (5th ed.) 165, 166, note. *Infra*, sec. 275.

³ *State v. Cleveland*, 3 Rh. Is. 117. But no penalty can be enforced for an illegal exaction. *Mayor v. Avenue Railroad Company*, 38 N. Y. 42; 39 *Id.* 261. “*Municipal fine*,” as used in the constitution of California, means a fine imposed by local laws of particular places, such as incorporated towns and cities, and not a fine imposed by the general laws of the State. *People v. Johnson*, 30 Cal. 98, 1866.

⁴ *Fisher v. Harrisburg*, 3 Grant (Pa.) Cas. 291, 1854; *Barter v. Commonwealth*, 3 Pa. (Pen. & W.) 253; *Trigally v. Memphis*, 6 Coldw. (Tenn.) 382, 1869. The amount must be reasonable. *Zylstra v. Charleston*, 1 Bay (South Car.) 382. The penalty, says Mr. Willcock, must be imposed on the person who violates the by-law. Thus, if goods be sold by an unauthorized per

by-laws gives to the corporation, without any express grant of power, the incidental right to enforce them by reasonable pecuniary penalties. What is reasonable depends upon the nature of the offence and the circumstances.¹

§ 273: *Charter Mode Governs*.—Where the charter or organic act prescribes the *manner* in which by-laws are to be enforced, or the sanctions or *punishments* to be annexed to their violation, this constructively operates to negative the right of the corporation to proceed in any other manner, or to inflict any other punishment. Thus, in the leading case² on this subject, the charter prescribed in what manner

son within the city, the penalty must be imposed on the seller, and not on the buyer, for how can he distinguish between those authorized to sell and those who are not. Willc. on Corp. 154, pl. 869, 870; Cadden v. Estwick, 1 Salk. 148, 192; S. C., 6 Mod. 124; and see, also, Fazakerley v. Wiltshire, 1 Stra. 469. The rule stated above, as to the person on whom penalties must be imposed, may be extended or enlarged by express provisions of the organic act of the corporation.

¹ Mayor, &c. of Mobile v. Yuille, 8 Ala. 137, 1841. A penalty, although small, fixed on every stroke of the hammer which an unauthorized person uses in his trade of a goldsmith, is unreasonable, Willc. 154, pl. 868. Same principle, Mayor, &c. of New York v. Ordrenan, 12 Johns. 122, 1815.

² Kirk v. Nowill, 1 Term R. 118, 124, 1786, *per Mansfield* and *Buller*; followed in Hart v. Mayor, &c., 9 Wend. 571, 588, 606, 1832; Cotter v. Doty, 5 Ohio, 394, 1832; Heise v. Town Council, 6 Rich. (South Car.) Law, 404, 1853; Miles v. Chamberlain, 17 Wis. 446, 1863. In Hart v. Mayor, *supra*, it was accordingly decided that a corporation having authority "to inflict penalties for the violation of any by-law, not exceeding \$25 for any one offence," could not pass a by-law subjecting property to *seizure* and *sale*, or *forfeiting* it, even though it was used contrary to the by-law which was in other respects valid, the remedy for enforcing their by-laws having been specified. 9 Wend. 571. *Infra*, sec. 282; sec. 656.

Where *specific modes* of procedure and penalties are prescribed against persons failing to take out license for keeping drinking houses, as fines, suits, and prosecutions, a municipal corporation, in the absence of express grant, has no right to close the doors of a drinking house *summarily*, because the keeper has failed to take out a license. Bolte v. New Orleans, 10 La. An. 321, 1855. That a municipal corporation *cannot annex others or greater penalties* than those authorized in its organic act; that power to punish by "fine" is exclusive, and that it is not competent to order a forfeiture in addition, see Schroder v. City Council, 2 Const. Rep. (South Car.) 726; S. C., 3 Brev. 538, 1815; McMullen v. City Council, 1 Bay (South Car.) 46, Zylstra v. Charleston, *Ib.* 382; New Orleans v. Costello, 14 La. An. 37; Columbia v. Hunt, 5 Rich. 550, 558; Kennedy v. Sowden, 1 McMul. (South

by-laws should be enforced, namely, by *fine* and *amercement*, or either, and it was decided that the corporation was precluded from declaring a *forfeiture* of property, or from inflicting any other punishment, and the doctrine of this case has been everywhere followed in the courts of this country.

§ 274. A charter of a city specifically enumerated various powers which the council was expressly authorized to enforce by a penalty not exceeding one hundred dollars for their violation; and the same charter empowered the council to prevent and remove encroachments upon the streets, but was silent as to the imposition of penalties for a violation of its provisions. The council passed an ordinance imposing a continuing penalty of ten dollars a day for every day's failure to remove an encroachment, after notice; and it was held, and properly so, that it possessed no power to impose such a penalty, but the decision was put upon the ground that the specific enumeration of the powers which might be rendered effectual by penal provisions *was an implied exclusion* of the right to impose any penalties whatever in other cases.¹

§ 275. *Penalty may be Within Fixed Limits.*—A municipal corporation, with power to pass by-laws and to affix penalties, may, if not prohibited by the charter, or if the penalty is not fixed by the charter, make it *discretionary, within fixed limits*, for example, "not exceeding fifty dollars." This enables the tribunal to adjust the penalty to the circumstances of the particular case, and is just and reasonable. The older English authorities, so far as they hold

Car.) 328; compare Crosby v. Warren, 1 Rich. Law, 385. An ordinance treated as wholly void because it fixed the minimum fine for an offence at five dollars when the law required it to be three dollars. Petersburg v. Metzker, 21 Ill. 205, 1859.

¹ Grand Rapids v. Hughes, 15 Mich. 54, 1866. Whether there is such an implied exclusion must depend in each case upon the supposed intention of the legislature, to be gathered from a survey of the whole charter. The authority to adopt an ordinance implies the right to enforce it by proper pecuniary penalties, and this right exists unless excluded by other provisions of the charter.

such a by-law void for uncertainty, are regarded as not sound in principle, and ought not to be followed.¹

§ 276. *Single Offence Cannot be Made Double.*—As the power to pass ordinances and to punish for their violation must be reasonably exercised, the corporation cannot multiply *one offence* into many, and punish for each. Thus, where an authorized ordinance prohibited “any person from cutting down and making use of cedar and other trees,” within a specified locality, a complaint, charging the defendant “with having cut down a cedar tree at various times, and that he continued to do so, from time to time, until he had committed one hundred violations of the ordinance, by cutting down one hundred cedar trees,” was held to set forth but a *single* offence, for, said the court, “the matter charged is a trespass with a *continuando*, which, in law, is but one offence, and it may well be that every tree cut by the defendant was cut on *one* day, and, under the ordinance, the cutting of more trees than one, at *one time*, would be but one offence.”²

§ 277. Where there is a limitation upon the corporation as to the *amount* of penalties to be imposed for the infraction of by-laws, they cannot exceed the limit directly, nor can they do so indirectly by multiplying what is, in substance, one offence, into several, or subdividing one transaction or violation into a number of offences, and annexing a penalty to each.³ But where each offence is distinct, and

¹ Mayor, &c. v. Phelps, 27 Ala. 55, 1855, overruling, on this point, Mayor, &c. v. Yuille, 3 Ib. 187; compare, Commissioners v. Harris, 7 Jones (Law) 281. See, also, Piper v. Chappell, 14 Mees. & W. 623, 649, 1845; Butchers' Co. v. Bullock, 3 B. & Pul. 434; Grant on Corp. 84. *In re Fennell, &c.*, 24 Upper Can. Q. B. 238. A by-law fixing one penalty for the first offence and a larger for the second, and a still larger one for every subsequent offence, does not appear to be bad for uncertainty. Butchers' Co. v. Bullock, *supra*. Where the penalty is fixed by by-law, it can only be changed by the same authority which affixed it. Rex v. Ashwell, 12 East, 29; Scarning v. Conger, 3 Leon. 7; Moore, 75; Bendl. 159; Davis v. Lowden, Carth. 29. A penalty fixed either by the charter or by-law is essential. Rowman v. St. John, 47 Ill. 337; Ashton v. Ellsworth, 48 Ill. 299. *Supra*, secs. 271, 272.

² State v. Moultrieville, Rice (South Car.) Law, 158, 1839.

³ Mayor, &c. of New York v. Ordrenan, 12 Johns. 122, 1815 (penalty for

the punishment for each is within the power of the corporation to impose, the punishment is not made illegal, though the separate fines in the aggregate exceed the limit allowed by the charter, and are imposed by the same magistrate or tribunal at one sitting.¹

§ 278. By its charter, the power of a city corporation to impose fines for breaches of its ordinances was *limited* to one hundred dollars. By the charter the city had also the power to regulate the inspection of flour, and passed an ordinance by which any person selling flour without inspection should be fined "five dollars for each barrel so sold." It was held that this ordinance, as to the penalty, was valid so far as to authorize a fine not exceeding one hundred dollars; that if a single sale exceeded twenty barrels the fine could be but one hundred dollars, while, if it was less than twenty barrels, the fine would be five dollars on each barrel. The court observed, that a recovery on a single transaction where more than twenty barrels were sold, would bar any future proceeding for the balance.²

§ 279. *Power of Forfeiture must be Expressly Conferred.*—A corporation under a general power to make by-laws cannot make a by-law ordaining a *forfeiture of property*. To warrant the exercise of such an extraordinary authority by a local and limited jurisdiction, the rule is reasonably adopted that such authority must be *expressly* conferred by the legislature.³ And even if the power to

illegally keeping powder), citing and approving opinion of Lord Mansfield in *Crupps v. Darden*, Cowp. 640. See, also, *Hart v. Mayor, &c.*, 9 Wend. 571, 588, 606, 1832; *Zylstra v. Charleston*, 1 Bay (South Car.) 382, 1794; *vide Stokes v. Corporation of New York*, 14 Wend. 87.

¹ *Heise v. Town Council*, 6 Rich. (South Car.) Law, 404 (fines for violating liquor ordinance); compare, *State v. Town Council of Moultrieville*, *supra*.

² *Chicago v. Quimby*, 38 Ill. 274, 1865.

³ *Kirk v. Nowill*, 1 Term R. 118, 124, *per Mansfield* and *Buller*, followed by Court of Errors of New York, in *Hart v. Mayor, &c. of Albany*, 9 Wend. 571, 588, *per Sutherland, J.*; p. 605, *per Edmonds*, Senator; 2 Kyd on Corp. 110; Willcock on Municipal Corporations, 180, pl. 449; Angell & Ames on Corp. sec. 360; *Cotter v. Doty*, 5 Ohio, 394, 1832; *White v. Tallman*, 2 Dutch. (N. J.) 67, 1856; *Phillips v. Allen*, 41 Pa. St. 481. In further illus-

declare a forfeiture is conferred, still no person can, by ordinance, be deprived of his property by forfeiture without notice or without legal investigation or adjudication; an ordinance in violation of this principle is void, as "contrary to the genius of our laws and institutions." In England the power of municipal corporations to impose a forfeiture for offences created by ordinances or by-laws, has been, in many cases, sanctioned by *usage*, without any express power in the charter to impose the forfeiture. But in this country, inasmuch as corporations derive all their power from charter or act of the legislature, the right to inflict a forfeiture must be plainly given, and cannot be derived from usage.¹

§ 280. *Power to Fine does not include Power to Forfeit.*—How strictly the courts hold that municipal corporations cannot pass by-laws ordaining a *forfeiture* is strikingly illustrated by the case of *Heise v. The Town Council of Columbia*. The town council had power to enforce obedience to their ordinances "*by fine*, not exceeding fifty dollars." Special authority was given to municipal corporations to grant licenses to retail liquor. The council passed an ordinance relating to this subject, the penalty for violating which was a "fine of not more than fifty dollars for each offence, and also a *forfeiture of the license*." It was held that the license which was granted and paid for was, essentially, *property*; that the council could only impose *fin*es, and that it had no power to ordain a forfeiture of the license, there being (in the opinion of the court) no difference between the forfeiture of a license and of goods and chattels.²

tration, see *Mayor, &c. v. Ordrenan*, 12 Johns. 122; *Phillips v. Allen*, 41 Pa. St. 481; *Dunham v. Rochester*, 5 Cowen. 462, 1826; *Baxter v. Commonwealth*, 3 Pa. (Pen. & W.) 253; *Bergen v. Clarkson*, 1 Halst. (N. J.) 352; *Taylor v. Carondelet* (forfeiture of lease), 22 Mo. 105, 112; *Mayor, &c. of Mobile v. Yuille*, 3 Ala. 137, 1841.

¹ *Cotter v. Doty*, 5 Ohio, 384, 398; *Rosebaugh v. Saffin*, 10 Ohio, 82, 1840.

² *Taylor v. Carondelet*, 22 Mo. 105, 112; *Kirk v. Nowill*, 1 Term R. 118; *Adley v. Reves*, 1 Maule and Sel. 60.

³ *Heise v. Town Council, &c.*, 6 Rich. (South Car.) Law, 404, 1853.

§ 281. *Judicial Procedure Necessary in some Instances.*—An ordinance of the city of New Orleans authorizing, without any prior judicial proceedings, a sale, under the orders of the mayor, of all property suffered to remain on the levee beyond a specified period, is invalid, since it makes the corporation judges and parties in the same cause, and enforces a forfeiture and divests the owner of his property without a trial in due course of law. Such a power is not similar to that exercised by a corporation in removing nuisances, as that power arises from necessity and ceases with that necessity. It would be competent for the corporation to ordain that the property should be removed at the expense of the proprietor, and to recover these expenses, and any fine which might be imposed, by judicial proceedings.¹

§ 282. *Forfeiture of Animals at Large.*—The right to denounce a forfeiture against animals running at large in a town or city contrary to the provisions of ordinances forbidding it, must be plainly conferred or it will not be held to exist. This is in accordance with the rule of the English courts, that a statute will not be taken to invest, by implication, a municipal corporation with the extraordinary powers of forfeiting the property of the subject, and that, if it be intended that any such power shall be given, it must be by express words to that effect. The cases agree in holding that when the power to denounce the forfeiture against such animals is given, there should be either notice, actual or constructive, or prior legal proceedings. The view of the courts will be best understood by referring to some of the cases upon the subject. In Mississippi, an ordinance au-

¹ *Lanfear v. Mayor*, 4 La. 97, 1831. Compare with *Guillotte v. New Orleans*, 12 La. An. 432, 1857, in which it was held that an ordinance providing a forfeiture, for the use of the city workhouse, of bread illegally baked in violation of an authorized by-law of the corporation, is not contrary to a constitutional provision declaring that vested rights shall not be divested unless for purposes of public utility and for adequate compensation previously made. It may be observed, that the court, without any special discussion, assumed that power "to regulate everything which relates to bakers" gave authority to denounce a forfeiture of bread baked contrary to the provisions of the ordinance of the city. See, on this point, *Mayor, &c. of Mobile v. Yuille*, 3 Ala. 137, 1841.

thorizing the seizure and sale of hogs running at large, without notice or trial, or opportunity for trial, and providing that one-half of the proceeds of the sales should go to the hospital and the other half to the city marshal, was held to be in violation of the constitutional provision that no person "can be deprived of his property but by due course of law," and securing right to a jury trial.¹

§ 283. In a similar case in Ohio, *Grimke*, J., delivering opinion of the court, observes: "The ordinance commands the marshal to seize and impound the hogs, and then, without any reserve, *without any notice*, by means of which the owner might be able to exculpate himself, directs them to be sold and the proceeds placed in the city treasury. Such an ordinance is as contrary to the spirit of the charter (Cincinnati) as it is alien from the general genius of our institutions."²

§ 284. In North Carolina the general principle was declared that an ordinance of an incorporated town which authorizes the property of one man to be taken from him and given to another, without any *notice* to the owner or trial of his rights, was unlawful. The town authorities, under power given to make ordinances for the removal of nuisances and for the good government of the town, passed an ordinance to this effect: "That every hog at large in the said town shall be taken up and penned, and advertised to be sold on the third day, and unless the owner should pay the charges (specified in the ordinance) for taking up and keeping such hog, and a sale is effected, the money arising therefrom, after paying the charges, shall be paid over to

Donovan v. Vicksburg, 29 Miss. (7 Cush.) 247, 1855. Power to impose penalties on the owners of animals running at large excludes, by implication, the power to enforce a by-law upon the subject in any other way, as, for example, by a sale of the animals found at large. *Miles v. Chamberlain*, 17 Wis. 446, 1863. *Supra*, secs. 272, 273.

¹ *Rosebaugh v. Saffin*, 10 Ohio, 82, 37, 1840. However it may be when the power to forfeit without notice or prior legal proceedings is *explicitly conferred*, it is clear that the power, unless plainly and expressly given, cannot be exercised without such notice and previous adjudication; but with these the remedy may, if needful, be "prompt and strong." *Cincinnati v. Buckingham*, 10 Ohio, 257, 262, *per Lane*, C. J.

the owner of the said hog." The validity of this ordinance was drawn in question, and two points were ruled by the Supreme Court: 1. That the ordinance was reasonable, and the corporation, under the power above referred to, had authority to pass it. 2. That it sufficiently provided for notice to the owner by the impounding of the animal and the three days' public advertisement, and that personal notice was not necessary.¹ In a subsequent case in the same court a similar ordinance was sustained. It was objected that it was invalid, because it provided for no judicial decision condemning the property to be sold. This objection the court regarded as insufficient, "since the owner may, if he choose, have a full investigation of the case by bringing an action of replevin, as in any other case of distress."²

§ 285. In South Carolina it has been held, that under authority to enforce by-laws by *fine*, an ordinance, otherwise legal, which authorized the marshal to kill hogs running at large, contrary to the ordinance, and appropriate them to his own use, was void.³

¹ Shaw v. Kennedy (North Car.) Term R. 158, 1817; Helen v. Noe, 3 Ire. (Law) 498, 1843.

² Whitfield v. Longest, 6 Ire. (Law) 168, 1846. In Iowa a similar ordinance was sustained. Gooselink v. Campbell, 4 Iowa, 296, 1856; *Contra*, Willis v. Legris, 45 Ill. 289, 1867; Bullock v. Geomble, *Ib.* 218; Poppen v. Holmes, 44 Ill. 360. But see Hart v. Mayor, &c. of Albany, 9 Wend. 571, 1832; White v. Tallman, 2 Dutch. (N. J.) 67, 1856; Phillips v. Allen, 41 Pa. St. 481. Power must be strictly pursued or the sale will be void, and the officer a trespasser. Clark v. Lewis, 35 Ill. 417. Sale is void where two animals, belonging to different owners, are sold at once. *Ib.* *Ante*, sec. 101.

³ McRae v. O'Lain, cited Kennedy v. Sowden, 1 McMullen (South Car.) Law, 828. But authority to impose "*finer and penalties*" authorizes a fine against those who violate the ordinance forbidding hogs running at large, and the seizure, impounding, and sale (upon notice) of the animals to pay the fine, whether they belong to residents or non-residents. Kennedy v. Sowden *supra*; S. P. Crosby v. Warren, 1 Rich. (South Car.) Law, 385, 1845, Wardlaw, J., dissenting; McKee v. McKee, 8 B. Mon. 433, 1848. But it seems doubtful, upon the principles adopted in the construction of powers of this character, whether authority to impose fines and penalties extends any further than to the imposition of *pecuniary fines and penalties*. See Mayor of Mobile v. Yuille, 3 Ala. 137; White v. Tallman, 2 Dutch. (N. J.) 67, 1856. The power to forfeit, like the power to tax, should be

§ 286. *Equity will not Ordinarily Relieve against Valid Forfeitures.*—A forfeiture imposed by a municipal corporation, under legislative authority, for a violation of a valid by-law, and inflicted as a penalty for such violation, cannot be relieved against in equity, unless, perhaps, where peculiar circumstances furnish grounds for equitable interposition, the general doctrine being that equity may relieve against forfeitures declared by contract, but not against those expressly declared or authorized by statute.¹

§ 287. *Power to Enforce by Imprisonment must be Expressly Given.*—In this country it is not unusual to provide, in the organic act of municipal corporations, that if fines for violation of by-laws or ordinances are not paid, the offender may be committed to prison for a limited period. And, in respect to some offences public in their character, the power to imprison in the first instance is often conferred.² It is scarcely necessary to add, that unless the authority be plainly given it does not exist, and when given, before it can be exercised there must be a judicial ascertainment by a competent tribunal or magistrate of the guilt of the party.³

given either expressly, or, at all events, by *necessary* implication. And it has been held, that it cannot be implied from the power “to impose reasonable fines,” and to cause “all such fines and all such forfeitures and penalties as may be incurred under the laws and ordinances of the corporation to be assessed, levied, and collected.” *Cotter v. Doty*, 5 Ohio, 895, 1882.

¹ *Taylor v. Carondelet*, 22 Mo. 105 (forfeiture clause in lease); *Peachy v. Somerset*, 1 Str. 447; *Gorman v. Low*, 2 Edw. Ch. 824; *Keating v. Sparrow*, 1 Ball & Beat. 867; *State v. Railroad Company*, 8 How. (U. S.) 534.

² *Barter v. Commonwealth*, 3 Pa. (Pen. & W.) 253, 1831; *New Orleans v. Costello*, 14 La. An. 87; *Burlington v. Kellar*, 13 Iowa, 59; *London v. Wood*, 12 Mod. 686; *Bab v. Clerke*, Moore, 411; *Clarke's Case*, 5 Co. 64; 1 Roll. Abr. 364; Com. Dig. By-law, E, 1; *Chilton v. Railway Company*, 16 M. & W. 212; *King v. Merchant Tailors' Company*, 2 Lev. 200.

³ *Ex parte Burnett*, 30 Ala. 461, 1857. Fines for the violation of ordinances, held under special charter provisions, collectible by commitment of the persons or by *fiery facias*. *Huddleson v. Ruffin*, 6 Ohio St. 604. Authority to enforce penalties for violations of ordinances by “*distress and sale*” of property must be expressly or plainly granted. *White v. Tallman*, 3 Dutch. (N. J.) 67, 1856; *Bergen v. Clarkson*, 1 Halst. (N. J.) 67. And in England, likewise, such a power cannot be conferred by the crown, and

On Whom Ordinances are Binding, and Who must Notice them.

§ 288. *Who Bound.*—In *England* the by-laws of a municipal corporation bind not only the members, but, if they are general in their nature and purposes, and not limited to any particular class or description, but intended to extend to all persons coming within the local jurisdiction of the corporation, they bind all, whether members or strangers, and all must take notice of them at their peril. And by-laws made by a municipal corporation with respect to a liberty or franchise granted them, with local jurisdiction beyond the limits of the municipality, are as binding upon persons going into the liberty as the by-laws of the city upon those who come within its walls.¹

§ 289. So, also, *in this country* it is settled that valid ordinances bind not only the inhabitants of the corporation, but also strangers or non-residents coming within its limits. These, for the time being, are regarded as inhabitants, and liable in the same manner for violations of ordinances.² So far is plain. But suppose a person living with-

can only exist by authority of parliament or a special custom. *Clerke v. Tucker*, 3 Lev. 281; *S. C.*, 2 Vent. 188; *Lee v. Walis*, 1 Keny. Cas. 295; *Sayer*, 263; *Adley v. Reeves*, 2 Maule & Sel. 60; *Willc.* 179; *Glover*, 311.

¹ *Willc.* 105, 107; *Glover*, 289, 290; *London v. Vanacker*, 1 Ld. Raym. 498; *Salk.* 142; *Pierce v. Bartram*, Cowp. 270; *Fazakerley v. Weltshire*, 1 Stra. 462; *Kirk v. Nowill*, 1 Term R. 118; *Butcher Co. v. Mercy*, 1 H. Bl. 370. Do not bind beyond limits of authorized jurisdiction. See 3 Mod. 158; *T. Jones*, 144; 2 Brownl. 177; *Hob.* 211; *Hutt.* 6; 11 Rep. 53; *Godb.* 252. An ordinance passed in 1834, prohibiting the erection of "stables, &c. in the interior of the city of New Orleans, or any of its incorporated suburbs," held not to extend to the city of Lafayette, subsequently added, by act of the legislature, to the city of New Orleans. *New Orleans v. Anderson*, 9 La. An. 323, 1854.

² *Heland v. Lowell*, 3 Allen, 407, 1862; *Whitfield v. Longest*, 6 Ire. (Law) 268, 1846; approving *Pierce v. Bartram*, Cowp. 269. See, also, *Buffalo v. Webster*, 10 Wend. 99; *Commissioners of Wilmington v. Roby*, 8 Ire. (Law) 250; *Commissioners of Plymouth v. Pettijohn*, 4 Dev. (Law) 591; *Strauss v. Pontiac*, 40 Ill. 801, 1866; *City Council v. Pepper*, 1 Rich. (S. Car.) Law, 364, 1845; *City Council v. King*, 4 McCord (S. Car.) 487; *Marietta v. Fearing*, 4 Ohio, 427, 1831; *Dodge v. Gridley*, 10 Ohio, 173; *Horney v. Sloan*, 1 Smith (Ind.) 136; *Kennedy v. Sowden*, 1 McMullen, 328.

out the limits of the corporation suffers his cattle or property to stray into it and violate its ordinances. Here two questions may arise: 1st. Can such property, being *within* the corporation, be dealt with the same as if it belonged to an inhabitant of the corporation? It is held that it can.¹ 2d. Can such *non-resident* owner be made amenable *personally* to a penalty to the corporation? In other words, has a corporation power, unless expressly conferred, to provide for collecting a penalty from a non-resident who suffers his property to violate an ordinance, but who himself was, at the time, without the corporate limits? This remains, perhaps, to be settled, though it is certain that ordinances will not be construed to extend to persons living without the corporation and not being within it, unless such an intention plainly appears.²

§ 290. *Notice*.—All persons upon whom ordinances are binding are bound to take notice of them.³ But where a party is liable to a penalty if he does not do a given act upon notice, a newspaper notice is not sufficient, unless that mode is pointed out by the law or general power is given to

¹ *Whitfield v. Longest*, 6 Iredell (Law), 268, 1846; *Gosselink v. Campbell*, 4 Iowa, 296, 300, 1856; *Reed v. People*, 1 Park. Cr. Rep. 481.

² *Plymouth v. Pettijohn*, 4 Dev. (Law) 591. Inability to punish non-resident owner criminally in respect to property within corporate limits, see *Reed v. People*, 1 Park Cr. Rep. 481. Power "to make such prudential rules and regulations as may seem necessary for the better improving of the *common lands* of a town," &c., extends only to regulations as between those who have the right to enjoy them in common, but does not confer the power of imposing a penalty for *trespasses by strangers*; for such acts the town must pursue its common law remedy. *Foster v. Rhoads*, 19 Johns. (N. Y.) 191, 1821. See, also, *People v. Works*, 7 Wend. 486; *Holladay v. Marsh*, 3 Wend. 142. Ordinances cannot have an *extra-territorial* effect, unless the power be plainly conferred upon the corporation. *Strauss v. Pontiac* (liquor ordinance), 40 Ill. 301, 1866; *Gosselink v. Campbell*, 4 Iowa, 296. Whether a party *resides within the limits* embraced by an ordinance, is a question of fact. *Board v. Pooley*, 11 La. An. 743; *Police Jury v. Villaviabe*, 12 Ib. 788; *New Orleans v. Boudu*, 14 Ib. 303.

³ *Palmyra v. Morton* (sidewalk ordinance), 25 Mo. 593, 1860; *Buffalo v. Webster*, 10 Wend. 99, 1833. See *Reed v. People*, 1 Park. Cr. Rep. 481; *City of London v. Vanacre*, 12 Mod. 270, 272; *Glover on Corp.* 207, 290. *post*, secs. 471, 642.

the corporation embracing within it the authority to prescribe the kind and manner of notice.¹

Ordinances Relating to the Licensing, Regulation, and Taxing of Amusements and Occupations, Including the Sale of Intoxicating Liquors.

§ 291. *Nature of License Power.*—Charters not unfrequently confer upon the corporation the power “to license and regulate,” or to “license, regulate, and tax,” certain avocations and employments, and to “tax and restrain” or “prohibit” exhibitions, shows, places of amusement, and the like; and unless there is some specific limitation on the authority of the legislature in this respect, such provisions are constitutional.² Concerning useful trades and employ-

¹ *Keckeley v. Commissioners of Roads*, 4 McCord (S. Car.) 257, 1828.

² *City v. Clutch*, 6 Iowa, 546, 1858. In *Mayor, &c. of Mobile v. Yuille*, 3 Ala. 137, 1841, it was determined that there was nothing in the constitution of the state which would invalidate a grant of power to a municipal corporation “to license bakers, and regulate the weight and price of bread, and to prohibit the baking, for sale, except by those licensed.” Such a grant of power does not unlawfully interfere with the right of citizens to pursue their lawful occupations. In the *City of Boston v. Schaffer*, 9 Pick. 415, 1830, it was decided that it is competent for the legislature to grant a city or town power to require the payment of money as the condition of exercising particular employments, *e. g.* giving theatrical or other exhibitions. This is not in the nature of a *tax*, which must be general, but of an excise on special vocations. Approved, *Cincinnati v. Bryson*, 15 Ohio, 625; *New Orleans v. Turpin* (auctioneers), 13 La. An. 56, 1858; *Municipality v. Dubois* (livery stable keeper), 10 *Id.* 56; *Charity Hospital v. Stickney*, 3 La. An. 550; *Slaughter v. Commonwealth*, 13 Gratt. (Va.) 967; *Carrol v. Mayor, &c.*, 12 Ala. 173; *Merriam v. New Orleans*, 14 La. An. 318; *Wynne v. Wright*, 1 Dev. & B. (N. Car) Law, 19; *The Mayor, &c. v. Hartridge*, 8 Geo. 23; *Cincinnati v. Bryson*, 15 Ohio, 625, dissenting opinion of *Burchard, J.*; *Collins v. Louisville*, 3 B. Mon. (Ky.) 133; *The Germania v. State*, 7 Md. 1; *The State v. Roberts*, 11 Gill & Johns. (Md.) 506; *Sears v. West*, 1 Murph. (N. Car.) 291; *People v. Thurber*, 13 Ill. 557; *Savannah v. Charlton*, 36 Geo. 460, 1867. *Post*, secs. 624, 630; see chapter on Taxation, *post.* *Ante*, sec. 79. *Kniper v. Louisville*, 7 Bush (Ky.) 599.

These cases show some diversity of opinion as to the right to *tax particular employments* as distinguished from property; but the correct view, it is submitted, is this: Unless specially restrained by the constitution, the legislature may provide for the taxing of any occupation or trade; and may confer this power upon municipal corporations. But such taxes are apt to

ments, a distinction is to be observed between the power to "license" and the power to "tax." In such cases the former right, unless such appears to have been the legislative intent, does not give the authority to prohibit, or to use the license as a mode of taxation, with a view to revenue, but a reasonable fee for the license and the labor attending its issue may be charged. Respecting amusements, exhibitions, &c., the authority of the corporation under the power to license has been regarded as greater than when the same word is employed as to trades and occupations.¹ Words of this character, however, do not always have exactly the same meaning, and the intention of the legislature in using them must often be gathered from the whole charter and the general legislation of the state respecting the subject matter.

§ 292. In harmony with the foregoing principles, it has been held that, under authority "to license and regulate"

be inequitable and the principle not free from danger of great abuse. Hence ordinances of this character ought not to be sustained, unless the authority be expressly or otherwise unequivocally conferred.

¹ *Ash v. People*, 11 Mich. 347; *ante*, p. 198, sec. 79; *Freeholders v. Barber*, 2 Halst. 64; *Carroll v. Tuscaloosa*, 12 Ala. (N. S.) 173; *Greensboro v. Mullins*, 13 *Ib.* 341; *State v. Roberts*, 11 Gill & Johns. 506; *City Council v. Ahrens*, 4 Strob. 241; *Kip v. Patterson*, 2 Dutch. 298; *Portland v. O'Neill*, 1 Ire. 218; *Bennett v. Birmingham*, 31 Pa. St. 15; *Commonwealth v. Stodder*, 2 Cush. 562; *Day v. Green*, 4 Cush. 438; *Dunham v. Rochester*, 5 Cow. 462; *Lawrenceburg v. West*, 16 Ind. 337; *Cheney v. Shelbyville*, 18 Ind. 84; *Bennett v. People*, 30 Ill. 389; *East St. Louis v. Wehrung*, 46 Ill. 392; *Savannah v. Charlton*, 36 Geo. 460. *Post*, chap. XIX.

Distinction between *taxation* and *police regulation* well stated by *Depue, J.*, in *State v. Hoboken*, 33 N. J. Law, 280, 1869; *Commonwealth v. Markham*, 7 Bush, 486, 1870. *Post*, sec. 609. See, also, *Kip v. Patterson*, 2 Dutch. (N. J.) 298; *Mayor v. Avenue Railroad Company*, 32 N. Y. 261: 33 *Ib.* 42, distinguished and questioned in *Frankford Railway Company v. Philadelphia*, 58 Pa. St. 119, 1868; *Johnson v. Philadelphia*, 60 Pa. St. 445; *Freeholders v. Barber*, 2 Halst. (N. J.) 64. Difference between tax and a license to exercise particular callings upon making pecuniary compensation for the privilege. *People v. Thurber*, 13 Ill. 557; *Mount Carmel v. Wabash Co.*, 50 Ill. 69; *Kniper v. Louisville*, 7 Bush, 599. *Smith v. City of Madison*, 7 Ind. 86, 1855, so far as it holds that authority "to suppress and restrain" bowling saloons confers the power to license and *tax* them, cannot, as it seems to us, be sustained. *Mayor, &c. v. Beasley*, 1 Humph. (Tenn.) 240, holds that power in a charter to *regulate* and *restrain* tippling houses did not confer the power to tax them.

draymen, &c., a municipal corporation may, by ordinance, require a license to be first taken out, and charge a reasonable sum for issuing the same and keeping the necessary record, but cannot, by virtue of this authority, without more, levy a tax upon the occupation itself; and, under the power to *regulate*, it may make proper police regulations as to the *mode* in which the employment shall be exercised.¹

§ 293. So authority to a city to adopt rules and orders "for the due regulation of omnibuses, stages, &c.," was

¹ *Cincinnati v. Bryson*, 15 Ohio, 625, 1846. As to correctness of application of the principle of law to the facts, *quære*. Consult, in connection with the above case, *Mays v. Cincinnati*, 1 Ohio St. 268, 1853; with which compare, *Cincinnati v. Buckingham*, 10 Ohio, 261; and see cases cited *supra*, sec. 291. An act to regulate and license the keeping of *dogs*, was regarded as an exercise of the police, and not the taxing power of the state, and not to be within the constitutional provision requiring *uniformity* of taxation. *Carter v. Dow*, 16 Wis. 298, 1862; *Tenney v. Lenz*, *Ib.* 566. In the case last cited, *Paine, J.*, observes: "We cannot assent to the position that, if the sum required for a license exceeds the expense of issuing it, the act transcends the licensing power, and imposes a tax. By such a theory the police power would be shorn of all efficiency. . . . We have no doubt, therefore, that the legislature may, in regulating any matter that is a proper subject of the police power, impose such sums for licenses as will operate as partial restrictions upon the business, or upon the keeping of the particular kinds of property regulated." See, also, *Fire Department v. Helfenstein*, 16 Wis. 136. *Ante*, sec. 93. *Post*, sec. 609.

In *Ash v. People*, 11 Mich. 347, 1863, it appeared that, by its charter, authority was given to a city to erect, establish, and regulate markets and market places, and to *license* and regulate butchers and shop-keepers at any *other* place in the city, for the sale of meats, &c. and to authorize the mayor to grant such licenses and to prescribe the *sum* of money to be paid into the treasury of the city therefor. An ordinance prohibiting the keeping of meat shops outside of the public markets without a license, and requiring the payment of a license fee of five dollars, was sustained, although the amount exceeded the expense of making and registering the license. The court denied that the fee demanded was a *tax*, and regarded it as but a reasonable compensation for the additional expense of municipal supervision over the business at the place licensed. A *ferry license fee* of fifty dollars was held not to be a *tax*, within the meaning of the term, as used in the constitution of Michigan and the charter of the city of Detroit. *Chilvers v. People*, 11 Mich. 43, 1862; *ante*, sec. 79. "The power to license and regulate carries with it the right to require the payment of a [reasonable] sum in consideration of the license." *Per Wright, J.*, in *State v. Herod*, 29 Iowa, 123, 1870. *Post*, chap. XIX. sec. 609.

held not to authorize the adoption of an ordinance requiring the payment of a tax, or duty, on each carriage licensed, varying from one to twenty dollars, according to the different kinds of carriages, and the stands occupied. This was regarded as a direct tax upon the vehicle used, or its owner, and not necessary to secure the objects of the above grant of power to the city.¹ So where under an act authorizing the trustees of a village corporation to make ordinances "in relation to hucksters, and for the good government of the village," it was held that an ordinance was unauthorized which required that hucksters should, before exercising their employment, take a license, and be taxed a sum varying from five to thirty dollars.²

§ 294. On the other hand the power to "license, regulate, and restrain amusements," it was admitted or taken for granted would authorize an ordinance taxing, or requiring exhibitors to pay a specific sum for the privilege, this being considered as a means of regulating and restraining them.³ So a grant of power to a city or town to license

¹ Commonwealth v. Stodder, 2 Cush. 562, 572, 1848; distinguished from Boston v. Schaffer, 9 Pick. 415, as to licenses for theatrical exhibitions. Power to the city council of Charleston to make *inter alia*, "such ordinances respecting streets, carriages, wagons, carts, drays, &c. as to them shall seem expedient and necessary," was held to authorize an ordinance requiring all persons who drive for hire any cart, dray, wagon, or omnibus, within the city, to take out a license, and to require the vehicle to be numbered, or on failure to do so to pay a fine. City Council v. Pepper, 1 Rich. (South Car.) Law, 364, 1845. A similar ordinance, and imposing annual charge on each car of a street railway company, was sustained as a police regulation. Frankford Railway Company v. Philadelphia, 58 Pa. St. 119, 1868; S. P. Johnson v. Philadelphia, 69 Pa. St. 445. *Contra*, Mayor v. Avenue Railroad Company, 32 N. Y. 261. Power to license, tax and regulate horse railroads, hackney carriages, &c. does not extend to taxation of *private vehicles* used by a merchant or manufacturer. St. Louis v. Grove, 46 Mo. 374, 1870.

² Dunham v. Rochester, 5 Cowen, 462, 466, 1826. See further, Index, Markets.

³ Hodges v. Mayor, 2 Humph. (Tenn.) 61. See also, Carter v. Dow, 16 Wis. 299; Tenny v. Lenz, 1 b. 567. Speaking of this subject, Mr. Justice Cooley expresses it as his opinion that, where the right to impose license fees to operate as a restriction upon the business or thing licensed can be fairly deduced from the taxing power conferred upon the corporation, it

exhibitions "on such terms and conditions as to it may seem just and reasonable," authorizes it to exact *money* for the license; it is not confined to regulating time and place, establishing police regulations, &c.¹

§ 295. *Right must be plainly Conferred.*—Even the right to license must be plainly conferred, or it will not be held to exist. Thus, power to make "by-laws *relative to* hucksters, grocers, and victualling shops," does not authorize the corporation to exact a *license* from persons carrying on such business. Nor does the general power to pass prudential by-laws, not inconsistent with the laws of the state, confer the authority to demand a license.²

§ 296. *Monopolies invalid.*—The power to license and regulate a lawful and necessary business will not give the should be done, rather than to derive the right solely from the power to regulate. Const. Lim. 202, note.

¹ Boston v. Schaffer, 9 Pick. 415, 1830; distinguished from Commonwealth v. Stodder, 2 Cush. 562, 572, 1848.

² Dunham v. Rochester, 5 Cow. 462, 1826; Commonwealth v. Stodder, 2 Cush. 562, 1848; Mays v. Cincinnati, 1 Ohio St. 268, 1853; Gale v. Kalamazoo (market house contract), 23 Mich. 344, 1871. By-laws requiring a *license*, which may be so heavy as to amount to a prohibition, were justly considered to be in restraint of trade, which the general law favors, and in this case were adjudged void, "both for want of jurisdiction" in the corporation to pass them, and for want of "conformity to the general law." 1 Ohio St. 268. Where the charter gave the corporation the power "to *license* bakers, and to prohibit sales of bread except by those licensed," the court doubted whether under this, aside from the taxing power of the corporation, an ordinance could be supported which required twenty dollars to be paid by the baker for a license, although it admitted that the corporation could require a fee for issuing and registering the license. Mayor, &c. of Mobile v. Yuille, 3 Ala. 137, 1841. Statutory conditions precedent must be complied with to make a license valid; and licenses are generally considered personal, ceasing with the life of the license, and not transferable without consent. Munsell v. Temple (grocery license), 3 Gilm. (Ill.) 96; Lewis v. United States, Morris (Iowa) 199; Lombard v. Cheever (ferry license), *Ib.* 473; Brunette v. Mayor, 9 La. 430. As to power to *revoke* licenses: Towns v. Tallahassee, 11 Flor. 130, 1866. "Junk Shops," defined by O'Neill, C. J., "to be a place where odds and ends are purchased or sold," and cities are often empowered to exact a license from keepers thereof. City Council v. Goldsmith, 12 Rich. (South Car.) Law, 470, 1860. *Shows* defined: McKee v. Town Council, Rice (South Car.) Law. 24. *Licensed auctioneer* held not liable to the payment of a pawnbroker's license, under a city ordinance. Hunt v. Philadelphia, 35 Pa. St. 277.

corporation the power to make contracts which create, or tend to create, a monopoly.'

§ 297. *Intoxicating liquors*.—The authority of municipalities to license, tax, restrain, or prohibit the traffic in, or sale of, *intoxicating liquors*, is so differently conferred, and so largely influenced by the general legislation and policy of the State on the subject, that the decisions relating to it are mostly of local application. Sometimes the State laws are manifestly intended to repeal or modify prior special charter provisions, which gave the control of the matter to the local authorities;¹ and at other times incorporated places have, by the course of legislation, been excepted from the general operation of the State laws, and have been allowed to license, regulate, or prohibit the traffic, as they deemed best.²

¹ *Chicago v. Rumpff*, 45 Ill. 90, 1867. In this case, under a power granted to city, in its charter, to regulate and license the slaughtering of animals within the corporate limits, the common council passed an ordinance, whereby a particular building was designated for the slaughtering of all animals intended for sale or consumption in the city, the owners of which were granted the *exclusive right*, for a specified period, to have all such animals slaughtered at their establishment, they to be paid a specific sum for the privilege by all persons exercising it, and to have the option of accepting such proposition, but which was not to take effect until they executed a certain bond therein required; and it was held that this action of the corporate authorities could not be regarded as regulating or licensing the business, but was simply a conditional proposition, which, if accepted, would constitute a contract. It was also held that this contract tended to create a monopoly, and was therefore void. And the opinion was expressed that under the charter, authority was conferred simply to pass ordinances to locate and construct, and to regulate, license, restrain, abate, or prohibit slaughtering establishments within the prescribed limits; and to that end the corporate authorities may so regulate the business as to prohibit its exercise, except in a particular place; but the spot so designated must be open to the enjoyment of all persons alike, upon the same terms and conditions. A monopoly cannot be *implied*, but must rest upon express grant. *Canal Company v. Railroad Company*, 11 Leigh (Va.) 42, *per Tucker*, President; *Gale v. Kalamazoo*, 23 Mich. 344, 1871, in which the opinion of *Cooley, J.*, will be found to be highly instructive. *Post*, chap. XVIII. as to gas companies. *Post*, sec. 318, note.

² *State v. Harris*, 10 Iowa, 441; *Burlington v. Kellar*, 18 Iowa, 59; *Hammond v. Haines*, 25 Md. 541.

³ *Perdue v. Ellis*, 19 Geo. 586; *Trustees v. Keeting*, 4 Denio, 341. Con-

§ 298. Where there are general laws of the State respecting the sale of intoxicating liquors, a public corporation, by virtue of a general power "to make all *by-laws* that may be necessary to preserve the peace, good order, and internal police" therein, is not authorized to pass an ordinance requiring a corporate license, and punishing persons who sell such liquors without being thus licensed.¹

§ 299. In the absence, however, of controlling general legislation, power to a city to pass "in general, every other by-law or regulation that shall *appear to the city council* requisite and necessary for the security, welfare, and convenience of the city, or for preserving the peace, order, and good government within the same," was held to authorize an ordinance (and the same is constitutional) to prevent shopkeepers, unless licensed by the city, from keeping

struction of charters in connection with state laws on the subject. *Town Council v. Harbers*, 6 Rich. (South Car.) Law, 96; *Ib.* 404; *State v. Estabrook*, 6 Ala. 658; *West v. Greenville*, 39 Ala. 69; *Adams v. Mayor*, 29 Geo. 56; *Chaslain v. Town Council*, 29 Geo. 333; *Cuthbert v. Conley*, 32 Geo. 211; *State v. Garlock*, 14 Iowa, 444; *Harris v. Intendant, &c.*, 28 Ala. 577; *Robinson v. Mayor, &c.*, 1 Humph. 156; *Pekin v. Smelzel*, 21 Ill. 464; *State v. Plunkett*, 3 Harr. (N. J.) 5; both held consistent and able to stand together. *Byers v. Olney*, 16 Ill. 85; *Page v. State*, 11 Ala. 849; *Benefield v. Hines*, 13 La. An. 420; *Louisville v. McKean*, 18 B. Mon. 9; *Dietz v. City*, 1 Colorado, 828, 1871; *Burckholter v. McConnellsville*, 20 Ohio St. 308; *Baldwin Co. v. Liquor Dealers*, 42 Geo. 325; *State v. Sherman*, 20 Mo. 265. Liquor license fee held not a *tax*, in the constitutional sense of the term, compelling uniformity of taxation. *East St. Louis v. Wehrung*, 46 Ill. 392. Special provision of charter construed not to give power to *prohibit absolutely* the sale of liquor in the town. *Hill v. Decatur*, 22 Geo. 203.

¹ *Commonwealth v. Turner*, 1 Cush. 493, 1848. The limitations on such a general power to make by-laws, discussed by *Shaw*, C. J. As to text, see *Commonwealth v. Dow*, 10 Met. 382, 1845. General welfare clause does not authorize a municipal corporation to pass an ordinance prohibiting the retail of intoxicating liquors, when this is repugnant to the state laws on the subject. *Ex parte Burnett*, 30 Ala. 461, 1857. But under a different state of general legislation, see *State v. Clark*, 8 Foster (N. H.) 176, 1854; *Heisembrittle v. City of Charleston*, 2 McMullen (South Car.) 233; *State v. Ferguson*, 22 N. H. 424, 1851; distinguished from and commenting on the above cases. *State v. Freeman*, 38 N. H. 426, approving and following, *State v. Clark*, 8 Fost. 176; *Megowan v. Commonwealth*, 2 Met. (Ky.) 3, 1859.

spirituous liquors in their shops, or in any adjacent room.¹

A corporation whose charter contained the general welfare clause, and also specific power "to license persons to retail spirituous liquors, and to prohibit persons from selling without such license," and was, it seems, silent as to the amount which might be demanded for a license, was adjudged competent to enact an ordinance demanding \$500 as the fee for a retail license.²

Power by its charter to a city "to tax, or entirely suppress, all petty groceries," was held, in connection with other provisions of the charter expressly authorizing certain other subjects to be licensed, not to confer upon the corporation the power to grant licenses for retailing vinous liquors, and to demand a sum of money therefor.³

Ordinances Relating to Public Offences.

§ 300. *Distinction Between Laws and By-Laws—Concurrent Prohibitions, &c.*—Statute law and by-laws are

¹ *Heisembrittle v. City Council*, 2 McMullen (South Car.), Law, 233, 1842. Followed and affirmed: *City Council v. Ahrens*, 4 Strob. (South Car.) Law, 241, 1850. See *City Council v. Baptist Church* (giving preamble to charter in question), 1 *b.* 806, 808. A town had exclusive authority over the sale of liquors therein, and it was held that power to "regulate, restrain, and suppress shops and places for the sale of ardent spirits by retail," amounted to an authority to forbid the sale; for if there is a sale it must be made in some shop or place. *Clintonville v. Keeting*, 4 Denio, 341, 1847; *Thomas v. Mt. Vernon*, 9 Ohio, 290. Construction of charter provisions, holding that the sale of intoxicating liquors might be declared a nuisance by the municipal authorities. *Block v. Jacksonville*, 36 Ill. 301; *Goddard v. Same*, 15 *Id.* 588; *Byers v. Trustees, &c.*, 16 *Id.* 35; *Pekin v. Smelzel*, 21 *Id.* 464.

² *Perdue v. Ellis*, 19 Geo. 586, 1855. But see *Ex parte Burnett*, 30 Ala. 461, and compare that with *Intendant v. Chandler*, 6 Ala. 899. See also *St. Louie v. Smith*, 2 Mo. 113; where there was charter power to "restrain and prohibit tippling houses," and the corporation was held entitled to impose a license fee. Power to "tax" and "restrain" sale of liquor includes power to grant licenses. *Mt. Carmel v. Wabash County*, 50 Ill. 69, 1869.

³ *Leonard v. Canton*, 35 Miss. (6 Geo.) 189, 1858. Power "to prohibit tippling houses," does not authorize an ordinance prohibiting sales of beer by brewers. *Strauss v. Pontiac*, 40 Ill. 301, 1866. Prohibition in ordinance to sell liquors without license, held not to apply to sales by manufacturers, but to retail dealers. *St. Paul v. Troyer*, 3 Minn. 291.

intended to meet different wants and exigencies, and to serve different purposes. The former, when general in its nature and operation, is intended to furnish a rule for the government of the people of the state everywhere. The latter, made by the corporation under derivative authority, are local regulations for the government of the inhabitants of the incorporated place; and of course they must be void unless specially authorized by the charter or organic act of the corporation, when they are repugnant to, or inconsistent with, the general law of the land. No implied power to pass by-laws, and no express general grant of the power, can authorize a by-law which conflicts either with the national or state constitution, or with the statute of the state, or with the general principles of the common law adopted or in force in the state.

§ 301. The laws of the state operate within the limits of municipal corporations and upon their inhabitants the same as elsewhere, unless it is otherwise clearly provided in the charter, or by some statute of the state; and unless so provided, in case of conflict between *laws* and *by-laws*, the latter must give way. But the state may, and as to local matters frequently does, except municipal corporations from the operation of its laws, and either provides a special law for them or authorizes them to provide special regulations for themselves; and when this is done there is no conflict. But these local laws and regulations are at all times subject to the paramount authority of the legislature. Questions of difficulty have arisen in consequence of grants of power to municipal corporations to make ordinances respecting matters and acts already regulated by general statute, and if criminal in their nature, punishable under the laws of the state. Hence, the same act comes to be forbidden by general statute, and by the ordinance of a municipal corporation, each providing a separate and different punishment. The same transaction may, if complex in its nature, be in one part of it an offence against the general law, and in another against the by-law, but such cases present no difficulty. But can the same act be twice punished, once under the ordinance and once under the statute? The cases on this subject cannot be reconciled. Some hold that

the same act may be a double offence, one against the state and one against the corporation. Others regard the same act as constituting a single offence, and hold that it can be punished but once, and may be thus punished by whichever party first acquires jurisdiction.

§ 302. In view of the somewhat strict construction of grants of corporate powers, elsewhere explained and illustrated, and of the subordinate nature and purposes of by-laws, the following rules, although seeming to rest on sound principles, are, in view of the decisions, stated with some distrust of their entire correctness: I. A general grant of power, such as mere authority to make by-laws, or authority to make by-laws for the good government of the place, and the like, should not be held to confer authority upon the corporation to make an ordinance punishing an act—for example, an assault and battery—which is made punishable as a criminal offence by the laws of the State. The intention of the State that the general laws shall not extend to the inhabitants of municipal corporations, or that these corporations shall have the power, by ordinance, to supersede the State law, will not be inferred from grants of power general in their character; nor will such authority in the corporation be held to exist as an implied or incidental right. II. Where the act is, in its nature, one which constitutes two offences, one against the State and one against the municipal government, the latter may be constitutionally authorized to punish it, though it be also an offence under the State law; but the legislative intention that this may be done should be manifest and unmistakable, or the power in the corporation should be held not to exist. III. Where the act or matter, covered by the charter or ordinance, and by the State law, is not, essentially, criminal in its nature, and is one which is generally confided to the supervision and control of the local government of cities and towns, but is also of a nature to require general legislation, the intention that the municipal government should have power to make new, further, and more definite regulations, and enforce them by appropriate penalties, will be inferred from language which would not be sufficient were the matter one not specially relating to corporate duties, and

fully provided for by the general laws. Such are the general principles to be extracted from the authorities, but the exact state of the law will more satisfactorily appear, and, indeed, can only be seen by reference to the adjudicated cases; accordingly, the leading ones upon the subject are stated in the note,¹ and in some of its aspects the

¹ *Ex parte* Smith, Hempstead, 201, 1832; Mayor, &c. of Savannah v. Hussey, 21 Geo. 80, 1857; New Orleans v. Miller, 7 La. An. 651, 1852; Municipality v. Wilson, 5 *Ib.* 747; State v. Cowan, 29 Mo. 330 (furious driving); St. Louis v. Cafferata, 24 Mo. 94 (Sunday ordinances); Amboy v. Sleeper, 31 Ill. 499; State v. Ledford, 3 Mo. 102; Independence v. Moore, 32 Mo. 392; McLaughlin v. Stevens, 2 Cranch C. C. R. 148; St. Louis v. Bentz, 11 Mo. 61 (ordinance against vagrants); United States v. Holly, 3 Cranch C. C. R. 656; Jefferson City v. Courtmire, 9 Mo. 683 (ordinance against riots); Davis v. State, 4 Stew. & Port. (Ala.), 83; State v. Plunkett, 3 Harrison (N. J.), 5, 1840; Rice v. State, 3 Kansas, 141, 1865; Rogers v. Jones, 1 Wend. 261; Mayor, &c. of New York v. Hyatt, 3 E. D. Smith, 156; Borough of York v. Forscht, 23 Pa. St. 391; March v. Commonwealth, 13 B. Mon. 25; Commissioners v. Harris, 7 Jones (Law) 281; Brooklyn v. Toynbee, 31 Barb. 282; Davenport v. Bird, 34 Iowa, Dec. Term, 1871; Zylstra v. Charleston, 2 Bay (South Car.), 382; Petersburg v. Metzker, 21 Ill. 205, 1859; Barter v. Commonwealth, 3 Pa. 253; State v. Clark, 1 Dutch. (N. J.) 54; State v. Pollard, 6 Rh. Is. 290; People v. Jackson, 8 Mich. 110.

Treating of the *constitutional* question involved, Mr. Justice *Cooly* remarks, that although the decisions are not uniform, the clear weight of authority is, "that the same act may constitute an offence both against the state and the municipal corporation, and both may punish it without violation of any constitutional principle." Const. Lim. 199; S. P. March v. Commonwealth, 12 B. Mon. 25, 29, *per Simpson*, C. J. In *England* a by-law imposing a penalty on a corporator, for refusing to serve in a *corporate* office, is valid, notwithstanding the party may be indicted for the same refusal, as he may be in all cases of municipal offices necessary or proper to carry on the government of the corporation. Grant on Corp. 82. A distinction was there early made between grave offences classified as *pleas* of the crown and triable upon an issue of not guilty between the king and the defendant, and lesser or petty offences punishable by fine or amercement upon *presentment* in court leet, or inferior jurisdictions. See Hale P. C. vol. I. chap. LII.; vol. II. chap. XIX. Norton's Com. London, 370, 453.

In *Georgia* the general welfare clause in a charter was decided not to authorize the passage of an ordinance prescribing a different mode of trial and punishment *in addition* to that provided for by the general criminal code of the state, for harboring and enticing seamen. Savannah v. Hussey, 21 Geo. 80, 1857. The power of municipal corporations to legislate respecting offences fully covered by the state law is denied, and the general subject is largely and satisfactorily discussed, and it is well remarked that, in such cases, "the law of the state is the law of the corporation; and they cannot

matter is further considered in the chapter on Municipal Courts.

make another law for themselves." The following is extracted from the opinion delivered by a very able judge:—"Under the general grant of power (to pass all such ordinances as may seem necessary for the security, welfare, &c. of the city) the city authorities may cover all [proper] cases not provided for by the paramount authorities of the state. All those ordinances regulating cemeteries, commons, markets, vehicles, fires, exhibitions, lamps, licenses, water works, watch, police, city taxes, city officers, health, nuisances, &c., are legitimate and proper. Nay, I might go further, and concede that where a state law defines an offence generally, and prescribes a punishment without reference to the place where it is committed, in town or country, and the act, when committed in the streets and public places of the city, would be attended with circumstances of aggravation, such as an affray, for instance, the corporate authorities, with a view to suppress this special mischief, might probably provide against it by ordinance. But this is going quite far enough." But I deny that "a municipal corporation can legislate *criminaliter* upon a case fully covered by the state law, though aware that decisions may be found to support" that view. *Per Lumpkin, J.*, in *Savannah v. Hussey*, 21 Geo. 80. 86, 1857. And it is settled in Georgia, that where an act amounts to an indictable offence it cannot be punished under municipal ordinances, but the offender must be bound over to the proper court; if it does not amount to an indictable offence the offender may be punished under the ordinances of the municipality, and if it is a nuisance, steps may also be taken to have it abated. *Vason v. Augusta*, 38 Geo. 542, 1868.

But in *Alabama* it is held that a municipal corporation, with power to enact ordinances "for the *good government* of the place, not contravening the laws of the state," may pass an ordinance imposing a fine for an assault and battery within its limits, and a punishment under the state law for the same act is no bar to a prosecution under the ordinance. *Collier, C. J.*, delivering the opinion of the court, says: "The object of the power conferred by the charter, and the purpose of the ordinance itself, was not to punish an offence against the criminal justice of the country, but to provide a mere *police regulation* for the enforcement of good order and quiet within the limits of the corporation. * * The offences against the corporation and the state are distinguishable and wholly disconnected, and the prosecution at the suit of each proceeds upon a different hypothesis—the one contemplates the observance of the peace and good order of the city; the other has a more enlarged object in view—the maintenance of the peace and dignity of the state." *Mayor, &c. of Mobile v. Allaire*, 14 Ala. 400, 1848. If the principle stated in the text be correct, the soundness of this decision under the powers conferred upon the corporation may admit of doubt, but the same view had been previously taken in the same court in *The Mayor, &c. of Mobile v. Rouse* (liquor law), 8 Ala. 515, 1845. And see *Moore v. State*, 16 Ala. 411; *Greensboro v. Mullins*, 13 Ala. 341. Extent of police power. *Shafer v. Mumma*, 17 Md. 331. *Ante*, secs. 93, 95, 291, 292.

Ordinances Relating to the Public Health, Safety, and Convenience.

§ 303. *Health Ordinances—Hospitals and Burials.*—Our municipal corporations are usually invested with power

Authority to pass ordinances "to preserve the health and comfort of the town," does not empower the corporation to pass an ordinance to *prevent or punish breaches of the peace*. *Raleigh v. Dougherty*, 3 Humph. (Tenn.) 11, 1842. See chapter on Municipal Courts, *post*. Where *gambling* and the keeping of *gambling houses* are made public offences by the state laws, offenders may be prosecuted in the state courts for the violation of these laws, notwithstanding the organic acts of cities may give to the city council power "to restrain, prohibit, and suppress games and gambling houses." In thus holding, the court adds, "It is not necessary, in this case, to decide whether both the state and the city can punish for the same act; but we have no doubt that the one which shall first obtain jurisdiction of the person of the accused may punish to the extent of its power." *Rice v. State*, 8 Kansas, 141, 1865. The same point has been decided the same way in a late case by the Supreme Court of Minnesota. *State v. Crummey*, 17 Minn. 72, 1871. Gambling being punishable under the general law, a city council "invested with authority to make ordinances to secure the inhabitants against fire, against violations of the law and the public peace, to suppress riots, *gambling*, drunkenness, indecent and disorderly conduct, to punish lewd behavior in public places, * * and, generally, to provide for the safety, prosperity, and good order of the city," possesses, by virtue thereof, no power to make the keeping of any gambling device a misdemeanor, and to punish the same. *Mount Pleasant v. Breeze*, 11 Iowa, 399, 1860.

In *Missouri* it is held that where the same act (as, for example, furious driving in highways and public places) is a violation of a valid municipal ordinance and of the general criminal statutes of the state, the offender can be punished but once, and hence, to an indictment in the state court, he may plead a former conviction under the ordinance of the municipal corporation. *State v. Cowan*, 29 Mo. 330, 1860. But *quære*. The opinion in this case assumes, without discussion, that the offense is single. *Id.*

In *Slaughter v. People*, 2 Doug. (Mich.) 334, the principle was decided that it was not competent to punish, under a city ordinance, an act which was indictable. Illustrating the difference between prosecutions under special penal provisions of a city charter, of acts with specified fines and penalties affixed by the charter, but which acts are breaches of the law of the state wherever committed, and ordinary prosecutions under municipal ordinances, see *Wayne County v. Detroit*, 17 Mich. 390, 1868; *People v. Detroit*, 18 Mich. 445, 1869; *People v. Jackson*, 8 Mich. 110. *Post*, chap. XIII.

In *Indiana* it was first held, that where the act complained of is indictable as a criminal offence against the laws of the state, a person could not be punished for such act under or by virtue of the ordinances of a city. City

to preserve the health and safety of the inhabitants. This is, indeed, one of the chief purposes of local government, and reasonable by-laws in relation thereto have always been sustained in England as within the incidental authority of corporations to ordain. It will be useful to illustrate the subject by reference to some of the adjudged cases.¹ An ordinance of a city prohibiting, under a penalty, any person, not duly licensed therefor by the city authorities, from "removing or carrying through any of the streets of the city any house dirt, refuse, offal, or filth," is not improperly in restraint of trade, and is reasonable and valid. Such a by-law is not in the nature of a monopoly, but is founded upon a wise regard for the public health. It was contended that the city could regulate the number and kind of horses and carts to be employed by strangers or unlicensed persons as well as they could those of licensed persons. But *practically* it was considered that the main object of the city could be better accomplished by employing men over whom they have entire control, night and day, who are at hand, and able from habit to do the work in the best way and at the proper time.²

Council of Indianapolis v. Blythe, 2 Ind. (Carter) 75, 1850. In this case the city, unsuccessfully, sought to recover a penalty prescribed by ordinance for an assault and battery committed by the defendant within the city. Same principle, *City of Madison v. Hatcher*, 8 Blackf. 341, 1846. But these cases were overruled by *Ambrose v. State*, 6 Ind. 351, in which it was held that a single act might constitute two offences, one against the state and one against the municipal government, and "that each might punish in its own mode, by its own officers, the same act as an offense against each." *Perkins, J.*, in *Waldo v. Wallace*, 12 Ind. 582, 1859, where prior cases in that state are referred to. See, also, *Lawrenceburg v. West*, 16 Ind. 337; *Fox v. State*, 5 How. 410; *Moore v. People*, 14 How. 13.

In *Louisiana*, municipal corporations are held to have no power to impose a penalty on that which is made punishable as a criminal offense by the laws of the state. But it is admitted that there is a class of offenses against public order not made punishable by the state law, which it is within the power of such corporation to suppress. *New Orleans v. Miller*, 7 La. An. 651, 1852; *Municipality v. Wilson*, 5 Ib. 747. This cases seems to concede that the city corporation cannot punish for an act identical with that punished by the state law. See, also, *Commissioners v. Harris*, 7 Jones (Law) 281; *People v. Jackson*, 8 Mich. 110.

¹ *Ante*, chap. VI. sec. 95.

² *Vandine*, petitioner, 6 Pick. 187, 1828; commented on in Common-

§ 304. Authority by charter to pass ordinances respecting the harbors and wharves, and "every other by-law necessary for the security, welfare, and convenience of the city," gives to the city council power to pass a health ordinance, requiring boats coming from infected places to anchor before landing, and to submit to an examination, provided such ordinance be not repugnant to the general law of the state. And it was further held, that a general law of the state prohibiting "any person coming into the state from an infected place, and in violation of quarantine regulations," was not repugnant to and did not render the ordinance invalid.¹

§ 305. *Hospitals*.—Authority to the corporation of New Orleans "to pass such by-laws as they shall deem necessary to maintain the cleanliness and salubrity of the city," was considered, in view of its extensive nature, certain provisions of the civil code, and the liability of the city to epidemics, as conferring power upon the city council to prohibit the erection and maintenance of *private hospitals*: the court admitting that the same question had been decided otherwise by tribunals governed by the common law jurisprudence.²

wealth v. Stodder, 2 Cush. 562, 575, 576, 1848. In *Zylstra v. Corporation of Charleston*, 1 Bay (South Car.) 382, 1794, Mr. Justice *Waties* (one of the most accomplished of early American judges), speaking of an ordinance prohibiting the making of soap or candles contrary to the mode prescribed and within the limits of the city, says: "I am willing to admit that the by-law itself is a valid one. If it restrained an *inoffensive* trade it would not be so; but it is made to restrain one that is both offensive and dangerous. It is, therefore, calculated to guard the comfort and safety of the citizens; and the benefit of a by-law is, generally, the touch-stone of its validity."

Power to a city council to compel the owners and occupants of *slaughter-houses* to cleanse and abate them whenever necessary for the health of the inhabitants, was considered not to authorize an ordinance entirely prohibiting the slaughtering of animals within certain limits of the city. *Wrexford v. People*, 14 Mich. 41, 1865; see Metropolitan Board of Health, 37 N. Y. 661; *Shrader, Ex parte*, 38 Cal. 279, 1867. Powers with respect to *privies*. *Gregory v. Railroad Company*, 40 N. Y. 273.

¹ *Dubois v. Augusta*, Dudley (Geo.) 30, 1831. *Ante*, sec. 95.

² *Milne v. Davidson*, 5 Martin (La.), 410, 1827.

As to city hospitals, see *Vionet v. Municipality*, 4 La. An. 42; *Bozant v.*

§ 306. *Cemeteries and Burials*.—The public health, comfort, and convenience are concerned in the proper regulation of *burials*; and the evils resulting from its neglect are especially to be apprehended in the crowded populations of cities. Power to regulate this matter may properly be conferred upon municipal corporations. And such power will be held to be given by authority to make police regulations or to pass by-laws respecting the health, good government, and welfare of the place.¹ Power to city cor-

Campbell, 9 Rob. (La.) 411; City Council v. Boyd, 1 Const. Rep. A. D. 1817 (South Car.) 352; Tucker v. Virginia City, 4 Nev. 20. Municipal corporation may found hospitals for the poor under 39 Eliz. chap. V. *In re Newcastle*, 12 Clark & Fin. 402.

Quarantine ordinances of a municipal corporation, passed by virtue of a grant of power from the state, whereby passenger vessels are required to remain in quarantine for a specified period, are not repugnant to the commerce clause of the federal constitution. *St. Louis v. McCoy*, 18 Mo. 238, 1853; *S. P. St. Louis v. Boffinger*, 19 *Ib.* 13; *Metcalf v. St. Louis*, 11 *Ib.* 103. In modern usage, *quarantine* is not confined to vessels having on board the plague, but extends to vessels having on board other contagious diseases. *Per Tenney*, C. J., *Mitchell v. Rockland*, 41 Maine, 363, 1856; *S. C.* again, 45 Maine, 496, 1858; *ante*, sec. 95.

Boards of Health.—An ordinance creating and giving to the board of health “general supervision over the health of the city,” and “all necessary power to carry the ordinance into effect,” was considered to include the power to rent a building for a temporary hospital, to protect the city from an apprehended visitation of the cholera, and to make the corporation liable for the rent, although it did not become necessary to use the house. *Aull v. Lexington*, 18 Mo. 401, 1853. *Power of board of health* to bind corporation. *Frend v. Dennett*, 4 C. B. (N. S.) 576; *Barton v. New Orleans*, 16 La. An. 317; *Belcher v. Farrar*, 8 Allen, 325; *Hazen v. Strong*, 2 Vt. 427; *Commissioners v. Powe*, 6 Jones (Law) 134; *Wilkinson v. Albany*, 8 Fost. 9. Regularly, the *orders* of a board of health, directing the abatement of a nuisance, should be *in writing*. Such orders may be proved by the minutes of the board, by the written orders themselves, or by being recited in the proceedings of the corporation of which the board of health are members. How far *parol evidence* may be received of such orders, when it appears that no record or written evidence ever existed, is not free from doubt. *Meeker v. Van Rensselaer*, 15 Wend. 397, 1836, where parol evidence of this kind was held inadmissible by the Supreme Court. But see, in Court of Errors, *Van Wormer v. Mayor*, 18 Wend. 169; affirming *S. C.*, 15 Wend. 263. See, also, *People v. Adams*, 9 Wend. 333; 6 *Ib.* 651; *ante*, chap. XI.

¹ *Bogert v. Indianapolis*, 13 Ind. 134, 1859, *per Perkins*, J.; *Mayor, &c. of New York v. Slack*, 3 Wheel. Cr. Cas. 237, 1824; *Presbyterian Church v. Mayor, &c. of New York*, 5 Cow. 538, 1826; *Coates v. Same*, 7 Cow. 582,

poration, after enumerating various objects, "*in general* to pass every *other* by-law that to it shall seem requisite and necessary for the security, welfare, and convenience of the city," &c., was, by the Court of Appeals of South Carolina, considered to give authority to regulate the burial of the dead, and particularly to prevent the establishment of new burial grounds within the limits of the city, and, in the opinion of the organ of the court, also to regulate the time of burial, the manner of interment so as to prevent noxious effluvia, and to prohibit interments in the private gardens, yards, and by-places of the city.¹ But as every by-law must be reasonable, an arbitrary or unnecessary or oppressive restraint upon the right of burying the dead is invalid.²

§ 307. Where the burden to support a public *cemetery* is required to be borne by all the citizens, an ordinance throwing that burden upon a particular class is unreasonable and void.³ Cemeteries in cities are not *per se* nuisances,

1827; *Austin v. Murray*, 16 Pick. 121, 1834; *Commonwealth v. Fahey*, 5 Cush. 408, 1850; *New Orleans v. St. Louis Church*, 11 La. An. 244, 1856; distinguished from *Presbyterian Church v. Mayor, &c. of New York*, *supra*; *Commonwealth v. Goodrich*, 13 Allen, 546. The power of disinterment may be delegated by the legislature to municipalities. *Kincaid's Appeal*, 66 Pa. St. 411, 1870.

¹ *City Council v. Baptist Church*, 4 Strob. (South Car.) Law, 306, 309, 1850, *per Frost*, J.; *S. P. Bogert v. Indianapolis*, 13 Ind. 134, *per Perkins*, J.; *New Orleans v. St. Louis Church*, 11 La. An. 244; distinguished from 5 Cowen, 538, *supra*; *Musgrove v. Catholic Church*, 10 La. An. 431.

² *Austin v. Murray*, 16 Pick. 121, 1834; *Coates v. Mayor, &c. of New York*, 7 Cow. 585; *Commonwealth v. Fahey*, 5 Cush. 408, 1850.

The *law of burials*, in some of its relations to property and municipal rights, was ably considered by the Hon. Samuel B. Ruggles, referee, in the matter of the opening of *Beekman* street, in New York City, whose report establishing the following principles was confirmed by the Supreme Court: 1. In this country, corpses and their burials are not matters of ecclesiastical cognizance. 2. That the right to bury a corpse and preserve its remains is a legal right, belonging, in the absence of testamentary disposition, exclusively to the next of kin, and includes the right to select and change the place of sepulture at pleasure. 3. If place of burial is taken for public use the next of kin may claim indemnity for expense of removing and suitably re-interring their remains. *Matter of Beekman street*, 4 Bradf. (N. Y.) 503, 532, 1856; *Bogert v. City of Indianapolis*, 13 Ind. 134, 1859, *per Perkins*, J. See, also, *Matter of Brick Church*, 3 Edw. Ch. Rep. (N. Y.) 155.

³ *Beurojohn v. Mayor, &c.*, 27 Ala. 58, 1855.

but special circumstances may make them so. It is not, however, sufficient that they affect the market value of property in the vicinity.¹ A city corporation had power, by charter, "to establish cemeteries or burial places within or without the city." It was held that this would authorize the city to establish cemeteries of its own, and regulate them; but that it did not empower the council to subject to the control of the city sexton cemeteries other than those belonging to the city, nor to pass an ordinance prohibiting lot owners in private cemeteries, though within the city limits, from entering to bury without the permission of the city sexton, to be obtained only by paying him the price of digging a grave.²

§ 308. *Nuisances, and of the Power to Prevent and Abate.*—It is to secure and promote the public health, safety, and convenience that municipal corporations are so generally and so liberally endowed with power to prevent and abate nuisances. This authority may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal notion of a nuisance, but such power, conferred in general terms, cannot be taken to authorize the extra-judicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such.³ Speaking upon this subject in a very recent case, where a city, under authority to prevent and restrain encroachments on rivers

¹ *New Orleans v. St. Louis Church*, 11 La. An. 244, 1856; *Musgrove v. Same*, 10 *Id.* 431; *Lake View v. Letz*, 44 Ill. 81, 1867.

² *Bogert v. Indianapolis*, 13 Ind. 134, 1859.

³ *Crosby v. Warren*, 1 Rich. (South Car.) 385; *Roberts v. Ogle*, 30 Ill. 459; *Salem v. Railroad Company*, 98 Mass. 431; *Dingley v. Boston*, 100 Mass. 544; *Van Dyke v. Cincinnati*, 5 Disney, 532; *Lake View v. Letz*, 44 Ill. 81; *Wreford v. People*, 14 Mich. 41, 1865; *State v. Jersey City*, 5 Dutch. (N. J.) 170. That which is authorized by legislative authority cannot be declared a nuisance by a city corporation. *Id.* The power to abate nuisances is a portion of police authority necessarily vested in the corporation of all populous towns. *Kennedy v. Phelps*, 10 La. An. 227, *per Buchanan, J.* May pass ordinances to prevent as well as remove. *Gregory v. Railroad Company*, 40 N. Y. 273. A city held to have no power to destroy a dam across a creek within its limits as a nuisance. *Clark v. Mayor, &c. of Syracuse*, 13 Barb. 32.

running through it, commenced summary proceeding to remove a private wharf, an eminent judge uses this language: "But the mere declaration by the city council, that a certain structure was an encroachment or obstruction, did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by the mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property in the city, at the uncontrolled will of the temporary local authorities."

¹ *Per Miller, J.*, *Yates v. Milwaukee*, 10 Wall. 497, 1870; *Underwood v. Green*, 42 N. Y. 140; *Darst v. People*, 50 Ill. 286, 1869; *Miller v. Burch*, 32 Texas, 209, 1869. A person sick, even with contagious disease, in his own house or at a hotel, is not a nuisance. *Boom v. Utica*, 2 Barb. 104, 1848.

Works that amount to a private nuisance, causing actual damage to private persons, cannot be justified, under a license from the city council to erect them. But the fact of such license is evidence of great but not conclusive weight in favor of the party erecting and owning the works claimed to be a nuisance. *Ryan v. Copes*, 11 Rich. (South Car.) Law, 217, 1858. A *pig sty* in a populous place is, *per se*, a nuisance. *Commissioners v. Vansickle*, Bright. (Pa.) R. 69. *Livery stable* in a town is not, *per se*, a nuisance, it depends upon its location and the manner in which it is built, kept or used. *Aldrich v. Howard*, 7 Rh. Is. 87; S. C., 8 *Ib.* 246; *Burditt v. Swenson*, 17 Texas, 489, 1856; *Dargan v. Waddell*, 9 Ire. (Law) 244; *Kirkman v. Handy*, 11 Humph. (Tenn.) 406; *Coker v. Birge*, 10 Geo. 336. *Brick making*: *Wanstead, &c. v. Hill*, 13 C. B. (N. S.) 479. *Slaughter house*: *Dubois v. Budlong*, 10 Bosw. (N. Y.) 700; 20 N. J. Eq. 415. *Powder house*, with large quantities of powder therein, located in a city, is a nuisance. *Cheatham v. Shearn*, 1 Swan (Tenn.) 213, 216; *Dumesnil v. Dupont*, 18 B. Mon. 800. *Planing mill*: *Rhodes v. Dunbar*, 57 Pa. St. 274. As to *gas works*: *Cleveland v. Gas Light Co.*, 20 N. J. Eq. 201. *Steam flouring mill*: *Gilbert v. Showerman*, 23 Mich. 448. *Stock yards*: *Ib.* 296; *Ashbrook v. Commonwealth*, 1 Bush (Ky.) 139. In Louisiana, where the civil code (art. 655) provides that works, &c., causing annoyance "shall be regulated by the rules of the police or the customs of the place" where located, an ordinance of a city council ordering a blacksmith shop to be closed, as a nuisance is authorized by law, and may be carried into effect by an injunction, procured by the city in its corporate name, restraining the owner from continuing the shop. *New Orleans v. Lambert*, 14 La. An. 247, 1859.

Power of municipal corporation to remove nuisances, and how far their

§ 309. Power to municipal corporation to make "by laws relative to *nuisances* generally," has been decided to authorize an ordinance prohibiting the keeping, in any manner whatsoever, of a *bowling alley for gain or hire*, such a place being a public nuisance at common law.¹ So

decision as to fact of nuisance is conclusive. *Welch v. Stowell*, 2 Doug. (Mich.) 332; *Kennedy v. Board of Health*, 2 Pa. St. 366; *Commissioners v. Vansickle, Bright.* (Pa.) 69; *Green v. Savannah*, 6 Geo. 1; *Roberts v. Ogle*, 30 Ill. 459; *Clark v. Mayor, &c.*, 13 Barb. 32; *Saltonstall v. Banker*, 8 Gray, 195; *Kennedy v. Phelps*, 10 La. An. 227; *Green v. Underwood*, 42 N. Y. 140; *Darst v. People* (intoxicating liquors) 51 Ill. 286, 1869.

Under the English Municipal Corporations Act the council of any borough is empowered to make by-laws for the good rule and government of the borough, and *the prevention and suppression of nuisances* (*ante*, sec. 271), and it is held that this power respecting the suppression of nuisances is confined to the suppression and prohibition of acts which, if done, must necessarily and inevitably cause a nuisance, and it does not empower the council to impose penalties for the doing of things which may or may not be a nuisance according to circumstances. Thus, where the town council imposed a fine upon every person who should "keep, or suffer to be kept any swine within the borough, between the first of May and the first of October," it was held that the by-law was wholly invalid, as the keeping of a pig did not necessarily create a nuisance. *Addison on Torts*, 84, citing, *Everett v. Grapes*, 3 Law T. R. N. S. Q. B. 699; *Wanstead Local Board v. Hill*, 13 C. B. N. S. 479.

¹ *Tanner v. Albion*, 5 Hill (N. Y.) 121, 1843; followed, *Updyke v. Campbell*, 4 E. D. Smith, 570, 1855; *The People v. Sargeant*, 8 Cow. 139, which held that a room kept for the playing of billiards was not a public nuisance, though a profit was made of it, commented on and distinguished, and by *Cowen, J.*, doubted, in 5 Hill, *supra*. Whether a ball alley could be prohibited under the general authority to pass by-laws relative to good government, &c., was alluded to, but not determined. See *Jackson v. People*, 9 Mich. 111; *Smith v. Madison*, 7 Ind. 86. In the *State v. Hull*, 32 N. J. 158, 1867, it was held that a ten-pin alley kept for gain and public use in a town is not, *per se*, a nuisance. The law on the subject is very fully examined in the opinion of *Beasley, C. J.*, and the case of *Tanner v. Albion*, *supra*, reviewed and disapproved. Where a city has, by its charter, the power to determine whether bowling alleys should be allowed, and, if so, under what restrictions, an ordinance requiring them to be closed at a certain hour is valid. *State v. Hay*, 29 Maine (16 Shep.) 457, 1849; *State v. Freeman*, 38 N. H. 426; *supra*, sec. 302, note. Under authority to pass such ordinances as the council "may consider fit and proper to remove nuisances or causes of disease," &c., it was held that the city of Savannah might prohibit the growing of rice within the corporate limits, as being injurious to the health of the city, and abate the same, and that such an ordinance was valid as a police regulation. *Green v. Savannah*, 6 Geo. 1, 1849. Where proceedings in respect

under power to pass by-laws to prevent and remove nuisances, an ordinance may be passed inflicting a fine on any person who should exhibit a *stud-horse* in the streets of the corporation.¹

§ 310. Power "to suppress *bawdy houses*," gives the corporation authority, by implication, to adopt, by ordinance, the proper means to accomplish the end ; and among the methods which may be adopted, is one forbidding the owners of houses from renting or letting the same for this purpose, or with knowledge that they are to be thus used.² But power to the common council of a city "to make all such by-laws as it may deem expedient for effectually preventing and suppressing houses of ill-fame," does not authorize the council to decide that a given house is kept for that purpose, nor if kept for that purpose, does it authorize the council to order it to be demolished ; nor if thus demolished, will it justify the officers of the city who did it, in execution of the ordinance and resolution of the council.³

§ 311. A city charged by law with the duty of prevent-

to nuisances are instituted by order of the city council, chancery will not enjoin or interfere, "unless the municipal corporation have clearly transcended their powers." *Kennedy v. Phelps*, 10 La. An. 227, 1855 (building for *curing hides*) ; *S. P. Milne v. Davidson* (private hospital), 5 Martin (La.) 586, 1827 ; *Potter v. Menasha*, 30 Wis. 492, 1872.

¹ *Nolin v. Mayor*, 4 Yerg. (Tenn.) 163, 1833. Under power "to prevent and remove nuisances," a corporation may, if a vacant building is so used as to endanger by fire the property of others, or the health of the community, declare the same a nuisance and notify owner to abate it, and if he fails, the individual officer of the corporation who abates the nuisance may, on being individually sued, justify the act. *Harvey v. Dewoody*, 18 Ark. 252, 1856.

² *Childress v. Mayor, &c.*, 3 Sneed (Tenn.) 347, 1855. Power to make by-laws relative to nuisances, gives authority to impose penalties on the keepers of houses of ill-fame, and on persons owning houses used, with their knowledge, for this purpose. *McAlister v. Clark*, 33 Conn. 91, 1865. See *Ely v. Supervisors*, 36 N. Y. 297 ; *Shaffer v. Mumma*, 17 Md. 381, 1861. In prosecutions for keeping bawdy houses, the law, it has been said, so far relaxes the ordinary rule, that common reputation as to the character of the defendants, and of the houses which they keep, is admissible. *State v. McDowell, Dudley* (South Car.) Law, 346.

³ *Welch v. Stowell*, 2 Doug. (Mich.) 322, 1846.

ing obstructions of a river within its limits, may, by its own act, and without proceeding by indictment, abate or remove anything which obstructs the free and public use of the river, such as a *floating store-house*, calculated to remain stationary in the water, and which exclusively occupies a portion of the river, such a structure being a public nuisance.¹ It is no answer to this right of abatement that room enough is left for the public, or that the structure is beneficial;² or that the party erecting it is the owner of the adjacent lots.³

§ 312. But under the power to abate nuisances, property lawfully erected and existing, or a house which is only a nuisance because occupied by a business which is such, cannot be destroyed or demolished. The public can proceed by indictment, or the business carried on in the house suppressed.⁴

§ 313. *Markets, and of the Power to Establish and Regulate.*—The states, under their police power, may dele-

¹ *Hart v. Mayor, &c., of Albany*, 9 Wend. 571, 1832; a valuable and very carefully considered case; affirming *S. C.*, 3 Paige Ch. R. 213; *People v. Vanderbilt*, 28 N. Y. 396. See *Dutton v. Strong*, 1 Black, 23. The corporate body may abate or remove the nuisance; but without *express authority* cannot ordain a *forfeiture* of the structure, or seize and *sell it*, or convert the materials to their own use. 9 Wend. 571, 609, *supra*.

² *Id.* *Respublica v. Caldwell*, 1 Dallas, 150; *King v. Russel*, 6 East, 427; *King v. Cross*, 3 Camp. 224; *King v. Jones*, 3 Camp. 220.

³ *Hart v. Mayor, &c.*, 9 Wend. 571, 608; *Strange R.* 1247; 3 Bac. Abr. 686; 1 Hawk. P. C. 363, note 1.

⁴ *Clark v. Syracuse*, 13 Barb. 32; *Welch v. Stowell*, 2 Doug. (Mich.) 332, 1846; *Miller v. Burch*, 32 Texas, 209, 1869. When equity will interfere to prevent and remove nuisances which affect the public generally. *People v. St. Louis*, 5 Gilm. (Ill.) 372; *Hoole v. Attorney-General*, 22 Ala. 190. *Attorney-General v. Gas Company*, 19 Eng. Law and Eq. 639; *Aldrich v. Howard*, 7 Rh. Is. 87; *Zabriskie v. Railroad Company*, 2 Beasley Ch. (N. J.) 314; *Jersey City v. Hudson*, *Id.* 420; *Dumesnil v. Dupont*, 18 B. Mon. 800, 1857. A city council may, by resolution, direct its officers to proceed against a specified establishment as a nuisance, and cause the same to be abated under a general ordinance of the corporation; this is a different thing from passing an ordinance inflicting a fine upon a particular person for keeping a nuisance, which cannot be lawfully done. *Kennedy v. Phelps*, 10 La. An. 227, 1855. See *Commonwealth v. Goodrich*, 13 Allen, 545; *Municipality v. Blineau*, 3 La. An. 688.

gate to municipal corporations the authority to establish, or authorize the establishment of, markets; and it is competent to such corporations, under proper grants of power, to enact ordinances forbidding sales and purchases of marketable articles, except at designated market places. The extent of the power possessed by a particular corporation depends upon its charter. In England the regulation of markets by by-laws has long been exercised, and such by-laws are sustained as being reasonable, and conducive to the health and good government of the municipality.¹ In this country the practice is almost universal on the part of the legislature to confer upon the municipal agencies more or less authority with respect to markets and market places, and such grants are not so strictly construed as those which invest the corporation with powers of a more extraordinary or unusual character—at least such is the case unless a monopoly in favor of private individuals is sought to be sustained, against which the courts strongly lean.²

¹ *Pierce v. Bartram*, Cowp. 270; *Player v. Jenkins*, 1 Sid. 284; *Rex v. Cottrell*, 1 B. & Ad. 67, 1817. See, also, *Mosley v. Walker*, 7 Barn. & Cress. 40; *Mayor, &c. v. Pedley*, 4 Barn. & Adol. 397; *Grant on Corp.* 166, as to exclusive privileges in England as to markets and market tolls. *Definition*.—A market is a franchise or liberty derived from the crown, by grant, or prescription which presupposes a grant. 2 Black. Com. 37. “It is a designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale.” *Per Breese, J.*, *Caldwell v. Alton*, 33 Ill. 416.

“A *municipal market* consists: 1. In a *place* for sale of provisions and articles of daily consumption. 2. Convenient fixtures. 3. A system of police regulations, fixing market hours, making provisions for lighting, watching, cleaning, detecting false weights and unwholesome food, and other arrangements calculated to facilitate the intercourse and insure the honesty of buyer and seller. 4. Proper officers to preserve order and enforce obedience to the rules.” *Per Lane, C. J.*, *Cincinnati v. Buckingham*, 10 Ohio, 257, 1840.

² *Wartman v. Philadelphia*, 33 Pa. St. 202, 209, 1854; *Le Claire v. Davenport*, 13 Iowa, 210; *White v. Kent*, 11 Ohio St. 550; *St. John v. Mayor, &c. of New York*, 6 Duer, 315; *Ash v. People*, 11 Mich. 347; *St. Louis v. Jackson*, 25 Mo. 37; *St. Louis v. Weber*, 44 Mo. 547, 1869; *Nightingale's Case*, 11 Pick. 168; *Congot v. New Orleans*, 16 La. An. 21; *Buffalo v. Webster*, 10 Wend. 99; *Yates v. Milwaukee*, 12 Wis. 673; *Bethune v. Hughes*, 7 Geo. 560; *Ketchum v. Buffalo*, 14 N. Y. 356; *Municipality v. Cutting*, 4 La. An. 336; *New Orleans v. Guillotte*, 12 La. An. 818 (corporate partnership with individuals); *State v. Lieber*, 11 Iowa, 407; *Dubuque v. Miller*, 11 Iowa,

§ 314. *Power to Build and Establish*.—Incorporated cities and towns may have the power to build market houses without an *express* grant. Thus it has been held, that a town having authority “to make by-laws for managing and ordering its *prudential* affairs,” has power—the court looking somewhat to usage and custom to ascertain what subjects of common interest are embraced under the term, “*prudential*,”—to appropriate money for the erection of a market house, and to raise the amount by taxation. This power, it was admitted, more clearly exists in the case of large towns and populous villages.¹

§ 315. Power conferred upon a municipality “to *establish* and regulate markets,” authorizes, as a necessary incident, the purchase of ground upon which to erect a market building.² If the title to land purchased for the erection of a market house be taken by the municipal corporation in fee, no length of use of the same for a market will *dedicate* it for market purposes; and the markets may be abandoned or changed at the will of the council, and the land thus acquired and held be sold.³ It is incident to the

583; *Municipality v. Cutting*, 4 La. An. 335; *Morano v. Mayor*, 2 La. 218; *St. Paul v. Coulter*, 12 Minn. 41; *Atlanta v. White*, 33 Geo. 229.

The power to establish and regulate markets, like most other municipal powers, is a *continuing one*, and markets once established may be abandoned or changed at the pleasure of the corporation, and the tax-payers or property owners cannot restrain the action or determination of the council entrusted by the charter with the exercise of the power. *Gall v. Cincinnati*, 18 Ohio St. 563, 1869.

¹ *Spaulding v. Lowell*, 23 Pick. 71, 1839. If the real and principal object is the building of a market house, the appropriation of a portion of the building for other purposes, as the holding of courts, does not render the erection of the building illegal. If, however, the building of the market house is merely colorable, that is, done for the purpose of accomplishing distinct and unauthorized objects, it would, says Chief Justice *Shaw*, probably be treated as an abuse of power and a nullity. *Ib.*

² *Ketchum v. Buffalo*, 14 N. Y. 356; 17 N. Y. 449; *Caldwell v. Alton*, 33 Ill. 416. It is immaterial whether this power is conferred in express or direct terms, or given only as part of the power to make by-laws, ordinances, &c. *Per Selden, J.*, in *Ketchum v. Buffalo*, 14 N. Y. 356, 362. Purchase of land for market. *People v. Lowber*, 28 Barb. 65; S. C. more fully, 7 Abb. Pr. Rep. 158; *Gale v. Kalamazoo*, 23 Mich. 344, 1871.

³ *Gall v. Cincinnati*, 18 Ohio St. 563, 1869.

general power to build a market to determine upon the form, dimensions, and style of the edifice, and therefore to employ an architect to prepare plans, specifications, &c.¹

§ 316. But power to a municipal corporation to establish markets and build market houses will not give the authority to build them on a *public street*. Such erections are nuisances though made by the corporation, because the street, and the entire street, is for the use of the whole people. They are nuisances when built upon the streets, although sufficient space be left for the passage of vehicles and persons. Such erections may, it seems, be legalized by an express act of the legislature. But unless so legalized, a nuisance erected and maintained by a public corporation may be proceeded against, criminally or otherwise, the same as if erected by private persons.²

§ 317. Every municipal corporation which has power to make by-laws and establish ordinances to promote the general welfare, and preserve the peace of a town or city, may fix the time or places of *holding public markets* for the sale of food, and make such other regulations concerning them as may conduce to the public interest.³ The right to establish a market includes the right to abandon it, or shift it to another place when the public convenience demands it, and of this the council is the judge.⁴

¹ Peterson v. Mayor, &c. of New York, 17 N. Y. 449, 1858. His unauthorized employment by a committee is ratified by a resolution of the council passed with notice of the facts, adopting his plans, drawings, &c., and he may recover of the city for the labor and service of preparing them. *Ib.*

² Wartman v. Philadelphia, 33 Pa. St. 202, 210, 1854; St. John v. New York, 3 Bosw. (N. Y.) 483; State v. Mobile, 5 Port. 279, 1837; Commonwealth v. Rush, 14 Pa. St. (2 Harris) 186; Commonwealth v. Bowman, 3 Pa. St. (3 Barr) 202, 206. See chapter on Streets, *post*, sec. 521. Under the constitution of New Jersey, the legislature cannot authorize a market in the public streets without providing compensation to adjoining lot owners. State v. Laverack, 34 N. J. Law, 201, 1870.

³ *Per Black, C. J.*, Wartman v. Philadelphia, 33 Pa. St. 202, 209, 1854. Note his observations in this case upon the necessity and convenience of markets.

⁴ *Ib.* "The right to *establish* markets is a branch of the sovereign

§ 318. *Nature of Power to Establish and Regulate.*—A city corporation was invested by its charter with power “to erect market houses, to establish markets and market places, and to provide for the government and regulation thereof,” and it was at first decided, and in the author’s judgment properly decided, by the Supreme Court of the state, that this did not authorize the corporation to pass an ordinance *delegating* to an individual the right to erect market houses, and to charge rent for the use of the stalls therein, reserving to itself no power to *control* the same, and that the corporation could not compel persons to go to such markets; but subsequently this ruling was reversed, and it was held that such an ordinance was valid, and that the city had the power to authorize the erection of market houses by an individual, and to declare the same a public market, and to covenant to protect the owner in the exclusive privilege thereof; and that the city was liable for failing to protect him by the passage of the requisite ordinances, he having, on the faith of the ordinance, erected an expensive market house.¹

power, and the right *to regulate* them is necessarily a power of municipal police.” *Per Eustes*, C. J., *Municipality v. Cutting*, 4 La. An. 335.

¹ *Le Claire v. Davenport*, 13 Iowa, 210, 1862; overruling, *Davenport v. Kelly*, 7 Iowa, 102. It may be suggested that the right to pass such an ordinance, and the liability for failing to pass others, may admit, at least, of fair debate, in view of the surrender by the city of its charter powers, and its inability in law to make binding contracts with reference to the future exercise of its legislative authority. The soundness of this suggestion is confirmed by the decision in *Gale v. Kalamazoo*, 23 Mich. 344, 1871. *Post*, sec. 754. In the *Kelly* case, *supra*, the point was decided, and is not overruled, that the charter power to establish markets, &c., conferred upon the council the authority to prohibit the exposing and offering for sale meat in any other places than those the ordinance designated. *Ash v. People*, 11 Mich. 347; *Hatch v. Pendergast*, 15 Md. 251.

A city in granting a license and selling to a party the right to occupy a stall in the market does not *impliedly* contract to *protect* the lessee from competition by unlicensed persons; nor can such a contract be implied against the corporation from the existence of an ordinance prohibiting the same; and the failure of the officers of the corporation, though willful, to enforce the ordinance against unlicensed sellers, is no defence to a bond given by the lessee for the payment of stall rent. *Peck v. Austin*, 22 Texas, 261, 1858. Nor does a city owning and leasing a market house impliedly engage or covenant that it will not exercise its power to establish markets

§ 319. *Construction of Special Powers in Relation to Markets.*—Power to make “by-laws relative to the public markets,” &c., while it would not authorize a corporation entirely to prohibit the sale of meats, &c., within its limits, because this would be in general restraint of trade, will nevertheless authorize a by-law forbidding the *hawking about* or *selling by retail* meats, &c., except at the public markets and within certain limits about the same.¹ The courts differ somewhat in their construction of the extent of power to *establish* and *regulate* markets, as will be seen by the cases cited in the note.²

by erecting other market houses and leasing them to others; if it does so, the injury to the first lessees is *damnum absque injuria*. *Congot v. New Orleans*, 16 La. An. 21, 1861. As to duty of corporation where they sell or farm out an exclusive privilege to vend articles, to enforce ordinances designed to protect the privilege: *La Rosa v. Mayor*, 4 La. 24; *Same v. Same*, 1 *Ib.* 126; *Mayor, &c. v. Peyroux*, 6 Martin (La.) 155; *Griffin v. Mayor*, 5 Martin (La.) 279. City corporation cannot agree to abdicate its legislative powers in relation to markets, nor contract to create a monopoly. *Gale v. Kalamazoo*, 23 Mich. 344, 1871. *Ante*, sec. 296.

¹ *Buffalo v. Webster*, 10 Wend. 100, 1833. Chief Justice *Savage* affirms, *arguendo*, that such an ordinance would be valid under the common law power of corporations to make by-laws for the general good of the corporation. *Ib.* Approving *Pierce v. Bartram*, Cowp. 269; following *Bush v. Seabury*, 8 Johns. 418, 1811, and distinguished from *Dunham v. Rochester*, 5 Cow. 462; *Shelton v. Mobile*, 30 Ala. 540, 1857. “The fixing the *place* and times at which markets shall be held and kept open,” says the Supreme Court of New York in *Bush v. Seabury*, 8 Johns. 418, “and the prohibition to sell at other places and times, are among the most ordinary regulations of a city or town police, and would naturally be included in the general power to pass by-laws relative to the public markets. If the corporation had not the power in question, it is difficult to see what useful purpose could be effected, or what object was intended, by the grant of power to pass laws ‘relative to the public markets.’”

² Power to make ordinances concerning “markets, health, and good order” of the town, authorizes an ordinance prohibiting the sale of butcher’s meat within the corporate limits, excepting at the public market. *Winsboro v. Smart*, 11 Rich. (South Car.) Law, 551, 1858. It seems the defendant was convicted, though he sold the meat inside his own blacksmith shop. Such ordinances are sustained, says the court, on the ground that they are not in restraint of trade, but a proper regulation of it. *Ib.* So, in the City of St. Louis *v. Jackson*, 25 Mo. 37, 1857, where it appeared that the city, under proper authority, had erected a public, or city, market-house, and that by its charter it had power also, “to *regulate*,” by ordinance, the sale of meats, it was held that this gave the city authority to provide, by ordinance, that

§ 320. In a well considered case in Massachusetts it is decided that a city corporation has the clear right to pro-

“no person, not a lessee of a stall in the market, shall sell, or offer for sale, meat in less quantities than one quarter.” The court considered such an ordinance as reasonable, highly proper, and not in restraint of trade, and not embraced in the reasoning in the case of *Dunham v. Trustees of Rochester*, 5 Cow. (N. Y.) 462; S. P., see, also, *St. Louis v. Weber*, 44 Mo. 547, 1869; *Le Claire v. Davenport*, 13 Iowa, 210; *Davenport v. Kelly*, 7 Iowa, 102; *Ash v. People*, 11 Mich. 347. But in *Caldwell v. Alton*, 33 Ill. 416, 1864, where the city, by its charter, had power “*to establish and regulate markets*,” and under the power passed an ordinance forbidding, during market hours, the sale of vegetables outside the limits of the market, it was held that the city could not restrain a regular dealer or merchant from vending vegetables at his place of business outside of market limits during any part of the day, such a restraint of trade being unreasonable. The court reviewed many of the cases in other states on this subject, and were of opinion that the power to *regulate* could only extend to the market limits, and that these limits could not, under this power, be made to extend throughout the city. The court adhered to its views in a subsequent case in which it was held that power “to erect market houses, establish markets and market places, and provide for the government and regulation thereof,” does not authorize the council of a large and growing town to fix upon one market place, and prohibit all persons at all hours of the day from selling fresh meats elsewhere. Such an ordinance was regarded as unreasonable, in restraint of trade, and tending to create a monopoly. It was admitted, however, that if the ordinance had fixed a reasonable number of hours each day in which the prohibition should operate, leaving persons free to sell outside of market hours, it would probably be unobjectionable. *Bloomington v. Wahl*, 46 Ill. 489, 1868. So, in *Bethune v. Hughes*, 28 Geo. 560, 1859, the court, leaning against exclusive privileges, held that power by the charter to the corporation “*to establish and keep up a public market in the city for the sale of*,” &c., does not confer upon the city power to pass an ordinance prohibiting the sale of marketable articles elsewhere than at the market place. S. P. *St. Paul v. Laidler*, 2 Minn. 190, 1858; commented on and disapproved in *St. Louis v. Weber*, 44 Mo. 547, 1869; see *St. Paul v. Coulter*, 12 Minn. 41. An ordinance regulating the killing and bleeding of meats is authorized by power to regulate butchers, the place and mode of selling, and to prevent unlicensed persons from acting as butchers. *City of Brooklyn v. Cleves*, Hill & Denio, Suppl. 231, 1843. Under power to regulate the vending of meats, a conviction under an ordinance forbidding the sale of unwholesome meats and other provisions cannot be sustained for selling putrid eggs. *Mayor, &c. of Rochester v. Rood*, Hill & Denio, Suppl. 146.

By the Municipal Act of Canada the Council may pass by-laws “for establishing and regulating all markets; for preventing or regulating the sale by retail in the public streets of any meat, vegetables, fruit, or beverages; for regulating the place and manner of selling and weighing butcher’s

hibit, by ordinance, the occupation of a stand, for the vending of commodities, in the streets. It may thus prohibit not only its own inhabitants, but others. It may make the prohibition absolute, or it may make it conditional on obtaining license or permission. It is in the nature of a police regulation, and does not violate private rights or improperly restrain trade.¹

meat, fish, hay, straw, fodder, wood, and lumber, &c. Harr. Munic. Manual, 2d ed. p. 228. The following cases, digested by Mr. Harrison, show the judicial construction of the act:

The power is to regulate *all* markets established, apparently including those established by the Crown as well as those established by municipal authority. Regulation must of necessity include the appropriation of one or more parts of the market for one purpose and other part or parts for other purposes; of providing that free passage through the market be kept open for ready access to shops, stalls, or other places where different commodities are exposed for sale. Per *Draper*, C. J., in *Kelly and the Corporation of the City of Toronto*, 23 U. C. Q. B. 426.

A by-law enacting "that no butcher or other person shall cut up or expose for sale any fresh meat in any part of the city except in the shops and stalls in the public markets, or at such places as the Standing Committee on Public Markets may appoint," was held good. *Ib.* But a by-law enacting "that no person should expose for sale any meat, fish, poultry, eggs, butter, cheese, grain, hay, straw, cord-wood, shingles, lumber, flour, wool, meal vegetables, or fruit (except wild fruit), hides or skins, within the town, at any place but the public market, without having first paid the market fee thereon as therein provided, except all hides and skins from animals slaughtered by the licensed butcher of the corporation holding a stall in the market," was held bad. *In re Fennell and the Corporation of the Town of Guelph*, 24 U. C. Q. B. 238. Also, "that meat, fish, *poultry, eggs, cheese, grain, hay, straw, cord-wood, shingles, lumber, flour, wool, meal, vegetables or fruit* (except wild fruit), should not be exposed for sale within the municipality except in the market, before 12 o'clock, noon," was held bad as to the articles mentioned in italics. *Ib.*

¹ *Nightingale, Petitioner, &c.*, 11 Pick. 168, 1831. In this case the ordinance of the city (Boston) provided "that no inhabitant of the city of Boston, or of any town *in the vicinity* thereof, not offering for sale the produce of his own farm, &c., should, without the permission of the clerk of Faneuil Hall market, be suffered to occupy any stand with cart, sleigh, or otherwise, for the purpose of vending commodities in either of the streets mentioned in the first section of this ordinance," &c. It was objected against this ordinance that it was void: 1. Because it was partial, not operating upon all the citizens of the state equally. 2. Because it was uncertain, the term "*vicinity*" being indefinite. And, 3. Because it was in restraint of trade. But neither of these objections was considered tenable. The validity of such an ordinance was again affirmed by the same court in *Commonwealth*

§ 221. But authority to erect a market, and power “to regulate the general police,” and “to preserve the peace and good order of the city,” do not authorize the corporation to impose a *tax* for revenue purposes upon persons occupying market stands in *the streets*, or selling produce therein. Such a power must be plainly conferred or it will not be held to exist.¹

§ 322. The right to *regulate* markets established by a city under its charter is one of municipal police. The city authorities may say what articles shall or shall not be sold at the public markets, and may impose penalties on those who violate their ordinances. They may, for example, prohibit groceries and oysters from being sold at the public markets, and require oysters, which have a great tendency to putrefaction, to be sold at certain designated stands, and prevent their being sold elsewhere.²

§ 323. *Inspection Ordinances.*—A municipal corporation, says Mr. Willcock, may regulate the manner of carrying on trade within a municipality so far as to prevent

v. Rice, 9 Met. 253, 1845. See this case, also, as to requisites, in certain respects, of complaints for the violation of such an ordinance, and as to what acts will be deemed to be violations. *Shelton v. Mayor, &c. of Mobile*, 30 Ala. 540, 1857; *Wartman v. Philadelphia*, 33 Pa. St. 202, 1854. An ordinance forbade the sale of fresh meats except by persons licensed, but contained a proviso in favor of *farmers*, authorizing them to sell meats, the *produce of their own farms*. The evident object was considered to be to protect *licensed butchers*, and at the same time to allow farmers to come in and sell the produce of their own farms. It was held that an unlicensed *butcher* was not a “*farmer*” within the meaning of the *proviso*, although the meats which he sold came from sheep fattened on his farm, if the farm was only a convenient appendage to his business as a butcher. *Rochester v. Pettinger*, 17 Wend. 265, 1837.

¹ *Kip v. Patterson*, 2 Dutch. (N. J.) 298, 1857. This power, it was said, would authorize “the renting of stalls in the market house, and perhaps of even prohibiting sales in the public streets.” *Ib. per Elmer, J.*

² *Municipality v. Cutting*, 4 La. An. 335, 1849; *Morano v. Mayor*, 2 La. 218. Power of city to vacate leases and stalls in public market, under ordinance reserving the right, see *City Council v. Goldsmith*, 2 Speer's (South Car.) Law, 428. Occupant of city market failing to pay rent in advance, according to contract, held a tenant *at will*. *Dubuque v. Miller*, 11 Iowa, 503. Control over tenants. *Woelpper v. Philadelphia*, 38 Pa. St. 203.

monopoly, or the sale of unfit commodities, and to insure proper conduct in those who practice it within their jurisdiction.¹ In general, it may be said, that incorporated cities and larger towns in this country have conferred upon them the power to pass ordinances regulating, to a reasonable extent, the mode in which the traffic of the place shall be conducted; but they can exercise no powers in this respect not conferred.² Laws requiring articles to be inspected or weighed and measured before being sold, are in the nature of police regulations, and are valid in the absence of special constitutional provisions. When reasonable in their nature, they are not regarded as being in restraint of trade.³

§ 324. Power to a city "to regulate the public market, and to pass such other ordinances as shall seem meet for the improvement and good government of the city," authorizes an ordinance requiring oats, hay, &c., to be weighed

¹ Willc. Corp. 142, pl. 832.

² Nightingale's Case, 11 Pick. 108; Stokes v. New York, 14 Wend. 87; Raleigh v. Sorrell, 1 Jones (North Car.) Law, 49; Chicago v. Quimby, 38 Ill. 274, 1858; Howe v. Norris, 12 Allen, 82; Libbey v. Downey, 5 Allen, 299; Collins v. Louisville, 2 B. Mon. 134, 1841. Power to appoint measurers of wood, and affix a reasonable allowance to them, does not justify the imposition of a tax for revenue. *Ib.*

³ Cooley Const. Lim. 596; Raleigh v. Sorrell, *supra*; Stokes v. New York, *supra*; Page v. Fazakerly, 36 Barb. 392; Mayor, &c. of New York v. Nichols, 4 Hill (N. Y.) 209, 1843; compare Mayor v. Hyatt, 3 E. D. Smith, 156; Rogers v. Jones, 1 Wend. 287; Yates v. Milwaukee, 12 Wis. 673. The system of *inspection laws*, and the hosts of officers which they engendered, were considered by the constitutional convention of New York to entail annoyances and burdens upon the community sufficient to outweigh any benefits resulting from them; and the constitution of 1846 (art. V. sec. 8) abolished all such offices and forbade the legislature to re-create them, in this language: "All offices for the weighing, measuring, culling, or inspecting of any merchandise, produce, manufacture, or commodity whatever, are hereby abolished, and no such offices shall hereafter be created by law." See Tinkham v. Tapscott, 17 N. Y. 144, 147, 1858, where the origin, scope, and purpose of this provision are very satisfactorily discussed by Denio, J. In Illinois it is held that inspection power conferred upon a board of trade, to be exercised when requested by its members, may co-exist with like power in the city authorities to be exercised in all cases when requested. Chicago v. Quimby, 38 Ill. 274, 1858.

by the public weighmaster before being offered for sale, and imposing a penalty for its violation.¹

§ 325. A grant to the common council of "all powers, rights, &c., incident to municipal corporations and necessary to the proper government of the same," might authorize a city to prevent the sale of bread made out of unwholesome flour, and, as a consequence, to provide for its inspection, but it would not give the power to regulate the assize, that is, the weight and price of bread, for the latter is a power not absolutely necessary for the proper government of a city. Power, however, to a city, "to regulate everything which relates to bakers," does authorize an ordinance regulating the weight, size, and, it seems, the price, of bread, and the forfeiture of bread illegally baked; and such an ordinance, it has been held, is not in violation of any provision of the constitution of Louisiana.²

§ 326. *Police Regulations Respecting the Public Peace and Safety.*—Our city governments usually possess the power, either by express grant or by virtue of their authority to make by-laws relating to the public safety and good order of the inhabitants, to regulate the rate of *speed of travel* in the *public streets*; the route or streets over which omnibuses, stage-coaches, drays, &c., may run; the time of day in which the streets may be used for certain purposes; to interdict stoppages in the street to the delay of others; to exclude vehicles of all kinds from entering upon or passing over the sidewalks, &c., &c. The public

¹ Raleigh v. Sorrell, 1 Jones (North Car.) Law, 49, 1853; approving Nightingale's Case, 11 Pick. 108; Stokes v. Corporation of New York, 14 Wend. 87. This power was also held to authorize the creation of the office of weighmaster and the payment of his salary. 1 Jones, 49, *supra*. Construction of ordinance as to weighing hay on public scales. Goss v. Corporation, &c., 4 Sneed (Tenn.) 62; Yates v. Wilwaukee, 12 Wis. 673. Construction of statute as to mode of measuring grain. Frazier v. Warfield, 13 Md. 279. Of ordinance as to survey of lumber before sale. Briggs v. Boat, 7 Allen, 287.

² Guillotte v. New Orleans, 12 La. An. 432, 1857; Page v. Fazakerly, 36 Barb. 392. But as to forfeiture, *quære*, in absence of express power, and see Phillips v. Allen, 41 Pa. St. 481; Mayor, &c. of Mobile v. Yuille, 3 Ala 139.

safety and convenience may require regulations of this character; but they must not, unless made by virtue of specific authority, be unreasonable or improperly in restraint of trade.¹ Power to make by-laws for "the good rule and government" of the borough (*ante*, sec. 271), has reference to the government of the borough as a corporation, and the making of regulations for carrying into effect the purposes for which it was incorporated; but it does not enable a town council to carry out any peculiar ideas of general good government, and to impose penalties for the doing of things which are not prohibited by any public statute, nor by the common law.²

§ 327. Under a general power to make "needful and

¹ *Commonwealth v. Stodder*, 2 Cush. 562, 1848, where the subject of the power of cities over streets, particularly in reference to omnibuses, is fully considered by Mr. Justice *Dewey*; *Commonwealth v. Robertson*, 5 Cush. 438, 1850, as to stoppages in streets contrary to ordinance; *Baker v. City of Boston*, 12 Pick. 184, 1831; *Vanderbilt v. Adams*, 7 Cow. 349; *Ib.* 385; *Austin v. Murray*, 16 Pick. 126. Power to a city "to regulate the running of railroad cars," authorizes the adoption of an ordinance prohibiting the propulsion of cars by *steam* within the corporate limits. *Railroad Company v. Buffalo*, 5 Hill (N. Y.) 209, 1843. *Post*, chapter on Streets, sec. 565. In *Napman v. People*, 19 Mich. 352, 1869, a lawful arrangement between a railroad company and an omnibus company as to the delivery of passengers was held to be beyond municipal interference.

A by-law prohibiting *rapid driving* in the streets of a city by carters and others is not in restraint of trade, and is reasonable and valid; and in a prosecution for its violation, it is not necessary to prove that any individual was actually endangered by the fast driving. As the mayor and aldermen have no authority to give a person permission to violate an ordinance, evidence of such permission, as well as evidence of the defendant's general character as a careful driver, is inadmissible. *Commonwealth v. Worcester*, 3 Pick. 462, 1826; *Commonwealth v. Stodder*, 2 Cush. 562, 570, 1848; *Washington v. Nashville*, 1 Swan, 177. *Post*, chapter on Streets, sec. 565.

There is no obligation, in the absence of a valid municipal by-law or statute, on the part of people to keep *roofs clear of snow*, or to detain the snow so that it cannot slide into the street, though there may be, it seems, such a faulty construction of roof, as on proof thereof, would involve a liability on the part of the owner or occupier for accidents. *Lazarus v. Toronto*, 19 Upper Can. Q. B. 18, *per Robinson*, C. J. See *post*, sec. 788, note, and cases cited.

² Addison on Torts, 34; *Rex v. Westwood*, 4 B. & C. 781; *Reg. v. Wood*, 5 Ell. & Bl. 55.

salutary by-laws," a city ordinance of Boston, requiring the tenant or occupant, or, in case there shall be no tenant, the owners of buildings bordering on *certain* streets, *to clear the snow from the sidewalks* adjoining their respective buildings, is reasonable and valid. It was objected against this ordinance that it violated the fundamental maxim, that all burdens and taxes laid upon the people for the public good shall be equal. The objection was overruled. And it was justly regarded by the court as in the nature of a police regulation, requiring a duty to be performed highly salutary and advantageous to the citizens of a populous and closely built city, and imposed upon the persons named because they are so situated, as that they can promptly and conveniently perform it; and it is laid not upon a few, but upon a numerous class, and equally upon all who are within the description composing the class and who commonly derive a peculiar benefit from the duty required. It would doubtless be otherwise if the ordinance arbitrarily imposed this duty upon the mechanics, or merchants, or any other class of citizens between whose convenience and the labor required there is no natural relation.¹

§ 328. The power to make "salutary by-laws," with respect to the use of streets, will, it seems, authorize a city to pass by-laws regulating the *removal of buildings*, and the temporary use of the streets and highways for that purpose.²

§ 329. *Ordinances under Police Power and General Welfare Clause.*—Other illustrations of what a municipal corporation may do under the general welfare clause in its organic act, or under its police power or its implied right to

¹ Goddard, Petitioner, &c., 16 Pick. 504, 1835; Union Railway Company v. Cambridge, 11 Allen, 287; Kirby v. Boylston Market Association, 14 Gray, 252. *Post*, sec. 788.

² Day v. Green, 4 Cush. 488, 437, *per Shaw*, C. J. And where such a by-law prohibits the moving without a license granted by the mayor *and aldermen*, a license granted by the mayor is void, even though the board of aldermen, by a vote, had previously undertaken to delegate the power to grant such license to the mayor alone. The by-law contemplates that the mayor and aldermen should act unitedly as one body. *Ib.*

pass by-laws, or under a general grant of authority for that purpose, may be here given.

Under authority "to ordain and publish such acts, laws, and regulations, not inconsistent with the constitution and laws of the state as shall be needful to the *good order* of the city," it can, says *Howard, J.*, "subject to these restrictions and certain statute regulations, establish all suitable ordinances for administering the government of the city, the preservation of the health of the inhabitants, and the convenient transaction of business within its limits, and for the performance of the general duties required by law of municipal corporations."¹

§ 330. Power to pass such ordinances "to maintain the peace, good government, and order of the city, and the trade, commerce and manufactures thereof, as the council may deem expedient, not repugnant to the constitution and laws of the state," authorizes an ordinance prohibiting the *keeping open of stores*, shops, and places of business *on Sunday*, if its provisions do not conflict with state legislation.² But the general welfare clause does not authorize a

¹ *Per Howard, J.*, *State v. Merrill*, 37 Maine (2 Heath), 229, 1853. Such would undoubtedly be the proper construction if this were the only power given to the city to pass ordinances or by-laws. It should then be somewhat liberally construed. But if such a general grant is given in connection with, or at the end of, a long list of specific powers, perhaps so extended a construction might not then be due to it. The power conferred by general welfare clause is restricted by reference to other provisions of the charter or constituent act. *City Council v. Plank Road Company*, 31 Ala. 76, 1857; *Mount Pleasant v. Breeze*, 11 Iowa, 399, 400, 1860, *per Wright, J.*

² *St Louis v. Cafferata*, 24 Mo. 94, 1856; see *State v. Cowan*, 29 *Id.* 330; *State v. Ams* (constitutionality of Sunday laws affirmed), 20 Mo. 214; *S. P. Frolichstein v. Mobile*, 40 Ala. 725, 1867; *Hudson v. Geary*, 4 Rh. Is. 485, 1857; *Specht v. Commonwealth*, 8 Pa. St. 312; *Cincinnati v. Rice*, 15 Ohio, 225; *Karwisch v. Atlanta*, 44 Geo. 204, 1871. In the case of the *City Council v. Benjamin*, 2 Strob. (South Car.) Law, 508, 1846, it was decided by the Court of Appeals of South Carolina, that an ordinance of the city of Charleston, prohibiting "public exposures for sales, or sales of merchandise, on Sunday," was not a violation of that section of the state constitution which declares that "the free exercise and enjoyment of religious profession or worship, without discrimination or preference, shall forever hereafter be allowed within this state to all mankind." In that case the defendant was a Jew, and the city was not denied to be possessed of all the power on the

city to construct, or aid in constructing, a *plank road* or *toll bridge* built by a private company beyond the corporate limits of the city.¹

§ 331. The general welfare clause to pass ordinances for the good government, &c., of the corporation, does not authorize an ordinance requiring the *proprietor of a theatre*, circus, or other exhibition licensed by the corporation, to pay a peace or police officer of the place two dollars, or any sum, for each night's attendance upon such place for the purpose of enforcing order. Such an ordinance is unreasonable, and can only be passed when clearly authorized.²

§ 332. Where a city corporation is authorized "to ordain such laws not inconsistent with the constitution and laws of the state as shall be needful to the *good order* of the city," it may pass an ordinance imposing a penalty upon any person who shall mutilate or *destroy* any *ornamental tree* planted *in the streets*, lanes, or other public places within the limits of the city." Such an ordinance is not inconsistent with a state law punishing the *malicious* or *wanton* destruction of trees growing for ornament or use. Under the ordinance it is not necessary to allege or prove that the mutilation was malicious or wanton, and it would seem to be considered that it was no defence that the tree alleged to be mutilated was upon the street in front of the lot of the accused, who owned, subject to the public easement, *ad medium filum viæ*.³

subject which the legislature could constitutionally bestow. In the case of *Columbia v. Duke and Marks*, cited 2 Strob. 530, and approved, a similar decision was made at *nisi prius* by Mr. Justice *Martin*. And in this last case it was further ruled, that power in the charter to "establish such by-laws as may tend to the quiet, peace, safety, and good order of the inhabitants," authorized the passage of such an ordinance. Under "full power to pass such ordinances as the city council shall deem expedient for the government of the city, not contrary to the constitution of the state or the United States," a city may prohibit, within its limits, the sale of liquor on Sunday. *Megowan v. Commonwealth*, 2 Met. (Ky.) 8, 1859; *State v. Welch*, 36 Conn. 215, 1869.

¹ *City Council v. Plank Road Company*, 31 Ala. 76, 1857. *Ante*, sec. 106.

² *Waters v. Leech*, 3 Ark. 110, 1840. *Supra*, sec. 253.

³ *State v. Merrill*, 37 Maine (2 Heath), 329, 1853. *Contra* as to right of

333. Under a general power to pass "any other by-laws for the well-being of the city," its council may, by ordinance, prohibit saloons, restaurants, and other places of public entertainment, to be kept open after ten o'clock at night. The objections that such a by-law was unreasonable, and deprived the citizen of the constitutional right of "acquiring property," were not considered to be well taken. It regulates, but does not deprive the party of his rights.'

§ 334. Power "to regulate the police of the city," and to pass ordinances not inconsistent with law, authorizes an ordinance for *arresting and fining vagrants*, although, by the general law of the state, vagrants may be proceeded against before a justice of the peace, the court considering that this did not forbid the corporation from making a local regulation on the same subject not in conflict with the general law.'

adjoining owner. *Lancaster v. Richardson*, 4 Lansing (N. Y.) 136, 1871, see *post*, sec. 524, note. The case in Maine is a quite liberal construction of the words *good order*. But it is necessary that cities should have such an authority, and the power to pass the ordinance could, perhaps, be sustained as incidental to the power of the city over its streets and public places. *Post*, chapter on Streets.

¹ *The State v. Freeman*, 38 N. H. 426, 1859; following and approving on this point, *State v. Clark*, 8 Fost. (N. H.) 176; *Morris v. Rome*, 10 Geo. 532, 1851; *Hudson v. Geary*, 4 Rh. Is. 485, 1857. "It is an unavoidable consequence of city ordinances, that they in some degree interfere with the unlimited exercise of private rights." *Per Bell, J.*, in *State v. Freeman*, 38 N. H. 428; *State v. Welch*, 36 Conn. 215, 1869.

² *St. Louis v. Bentz*, 11 Mo. 61, 1857; distinguished from *Jefferson City v. Courtmire*, 9 Ib. 692, which was a summary proceeding for an *indictable* offence. See *State v. Cowan*, 29 Mo. 330; *Byers v. Commonwealth*, 42 Pa. St. 89, *per Strong, J.*; *Shafer v. Mumma*, 17 Md. 331, 1861. *Supra*, sec. 302.

A statute by which "two or more overseers of the town" were authorized to commit to the workhouse until discharged by law, by writing under their hands, to be there employed and governed according to the rules and orders of the house," &c., "all persons, able of body to work, and not having estate or means otherwise to maintain themselves, who refuse or neglect to do so, live a dissolute, vagrant life, and exercise no ordinary calling or lawful business sufficient to gain an honest livelihood," does not violate the constitutional right to "life and liberty," or the right, in "criminal proceedings, to be heard by counsel, confronted with witnesses," &c. The court did not regard it as a criminal proceeding, but as a reformatory or

§ 335. By virtue of its police power, a municipal corporation may pass an ordinance imposing a fine upon the owner of any *animal found estray* or *at large* within the limits of the corporation.

§ 336. If a municipal corporation has, by its charter, power to pass ordinances to preserve the peace and good order of the place, this gives it authority to provide for the punishment, in the manner allowed by its charter, of persons who shall rescue, or attempt to *rescue*, *prisoners* from the custody of the municipal officers.¹ But the general power, though expressly conferred, to enact by-laws for the good government of the town, does not confer the power to *levy taxes* of any kind, not even upon retailers of ardent spirits.²

§ 337. *General Welfare Clause—Continued.*—The general welfare clause, in a charter empowering the city council to pass such other ordinances as appear necessary for the *security* of the city, authorizes an ordinance regulating the mode of keeping and sale of *gunpowder* within the limits of the corporation, such as requiring all gunpowder brought into the city to be conveyed to the public magazine of the

correctional one, so far as the person proceeded against was concerned, and designed to protect the community from becoming chargeable with the person's support. *Adeline Nott's Case*, 11 Maine, 208, 1834; *S. P. Portland v. Bangor*, 42 Maine, 403, 1856, *Rice*, J., dissenting. See *Byers v. Commonwealth*, 42 Pa. St. 89. In a late case in Illinois, the Supreme Court of that state decided that the act creating the Reform School was unconstitutional, and that the act, so far as it restrained liberty for any cause except actual crime, was in violation of the Bill of Rights. *People v. Turner*, 10 Am. Law Reg. (N. S.) 366, and approving note of Judge *Redfield*; S. C., 55 Ill. 280.

¹ *Municipality v. Blanc*, 1 La. An. 385, 1846; *Case v. Hall*, 21 Ill. 632; *Commonwealth v. Bean*, 14 Gray, 52; *Commonwealth v. Curtis*, 9 Allen, 266; *Roberts v. Ogle*, 30 Ill. 459; *McKee v. McKee*, 8 B. Mon. 433, 1848; *Waco v. Powell* (hogs at large), 32 Texas, 258, 1869. *Ante*, sec. 255, note. *Supra*, sec. 282. Construction of ordinance prohibiting the *suffering* of animals to run at large, and what must be shown to subject a person to liability under such an ordinance. *Collinsville v. Scanland*, Ill. Sup. Court, 1872.

² *Independence v. Moore*, 32 Mo. 392, 1862

³ *Commissioners of Ashville v. Means*, 7 Ire. (Law) 406, 1847; *Ex parte Burnett*, 30 Ala. 461, 1857. *Post*, chap. XIX.

city, except when it is to be retailed, and then to be kept in limited quantities and in secure canisters. And it was so held, notwithstanding the point was made in argument that the general welfare clause in the charter could not enlarge the powers of the corporation further than is necessary to carry into effect the specific grants of power.¹

§ 338. Municipal corporations, with power to provide for the safety of their inhabitants, may prohibit the throwing of heavy or *dangerous articles*, from the upper stories of buildings, *into the streets* or open spaces near them, where persons are in the habit of passing; and may establish *fire limits*, and prevent erection therein of *wooden building*.²

§ 339. Under authority to make police regulations, or to pass by-laws for the good rule and government of the corporation, it has the power to require *hoistways inside* of stores (usually places of public resort) to be enclosed by a railing, and closed by a trap door after business hours each day. It was justly regarded as a reasonable po-

¹ Williams v. Augusta, 4 Geo. 509, 1848; Frederick v. Augusta, 4 Ib. 561, where the charter of Augusta is more fully given.

² City Council v. Elford, 1 McMullen (South Car.) Law, 234, 1841; Brady v. Insurance Company, 11 Mich. 425; Douglas v. Commonwealth, 2 Rawle, 262; Wadleigh v. Gilman, 12 Maine, 408; Vanderbilt v. Adams, 7 Cow. 349, 352, *per Woodruff, J., arguendo*. Instance of a want of power to restrict erection of wooden buildings. Mayor, &c. v. Thorne, 7 Paige, 261. Cities may constitutionally be authorized to prevent the erection of *wooden buildings* in certain portions thereof. Respublica v. Duquet, 2 Yeates (Pa.) 493. In Wadleigh v. Gilman, *supra*, it was decided that the *removal* of a wooden building to the prohibited district, or even from one part of the district to another, was within the meaning of the term, *erection*, as used in the ordinance. "The mischief," says *Weston, C. J.*, "did not consist in the act of erecting, but in the continuance of the erection. The ordinance did not meddle with erections as they stood; this would have transcended their power." Difference between "erecting" and "repairing." Brady v. Insurance Company, 11 Mich. 425, 449, opinion of *Campbell, J.*; Brown v. Hunn, 27 Conn. 332; Booth v. State, 4 Conn. 65; Tuttle v. State, *Ib.* 68; Stewart v. Commonwealth, 10 Watts, 307. Remedy against wrong-doer, by private action in favor of an adjoining owner specially injured by a violation of a statute in relation to the erection of wooden buildings. Aldrich v. Howard, 7 Rh. Is. 199. See Index—*Fire*.

lice regulation not unnecessarily interfering with private rights.¹

§ 340. Power “to prevent disturbances and disorderly assemblages, and maintain the good government of the city,” authorizes it to take measures *to preserve the peace* and to protect the lives and property of the citizens, and the acts of the city in procuring a loan of arms and giving a bond for their return, are valid and binding upon it.² Authority to preserve the peace and quiet of the place authorizes an ordinance forbidding “all *disorderly shouting, dancing, &c.*, in the streets and public places,” though such conduct violates no existing state law.³

Mode of Enforcing Ordinances.

§ 341. *Civil Actions and Complaints.*—In the old corporations in England, by-laws were usually made in virtue of their implied power; they did not extend to matters criminal in their nature, and could only be enforced, unless by virtue of a statute or valid custom, by fines or pecuniary penalties, commonly for a small sum, and always, or almost always, in a fixed or certain amount.⁴ So, by the Muni-

¹ Mayor, &c. of New York v. Williams, 15 N. Y. 502, 1859. Johnson, J., observes: “The danger is not confined to the owner and ordinary occupants of the building. The ordinance, in that respect, stands on the same footing as a regulation prohibiting a well or cistern in a man’s yard unprotected by curb or cover, the reasonableness of which could not be doubted. In case of fire, these openings would tend directly and powerfully to allow the fire to extend through all parts of the building, and, if left uncovered, would also tend to endanger those whom duty might require to enter to effect the extinguishment of the fire.” Paige, J., considered the ordinance the same in principle as fire laws, prescribing the height, thickness of walls, and materials of building within the city.

² State v. Buffalo, 2 Hill (N. Y.) 434, 1842; New Orleans v. Costello, 14 La. An. 37.

³ Washington v. Frank, 1 Jones (N. C.) Law, 436, 1854. As to what regulations of this kind are necessary, “much,” says the court, “must be left to the judgment and discretion” of the corporate authorities. *Ib.* State v. Bell, 13 Ire. (Law) 378. *Post*, chap. XIII.

⁴ Gee v. Wilden, Lutw. 1320, 1324; Wood v. Searl, Bridg. 139; Piper v. Chappell, 14 M. & W. 624; Rawlinson on Corp. 665, note. See *post*, chapter on Municipal Courts.

icipal Corporations Act of 1835, the council are empowered to make such by-laws as to them shall seem meet for the good rule and government of the borough, and for the prevention and suppression of all such nuisances as are not punishable by act of parliament in force in the borough, and to appoint such *fin*es as they shall deem necessary for the prevention and suppression of such offences, with the proviso that no fine shall exceed the sum of five pounds.¹ The act provides that prosecutions for a breach of by-laws made under it, shall be commenced within three months after the commission of the offence; that the charge shall be made on oath; that a summons shall issue and be served, with power to the magistrate to proceed without the appearance of the defendant, or to issue a warrant for his arrest; that if convicted, the penalty shall be paid either immediately or within such period as the magistrate shall think fit; that it may be levied by distress and sale of the goods and chattels of the offender, and for want of sufficient distress the offender may be imprisoned for a term not exceeding one month, the imprisonment to cease upon payment of the sum due.² It is suggested that the remedy thus prescribed is cumulative, and will not debar the corporation from availing itself of the usual common law mode of enforcing a by-law by action of debt or assumpsit.³ But the point seems not to have been yet adjudged.

§ 342. Aside from statutory regulation, the general method of enforcing a by-law in England is, as just stated, by bringing, in the name of the proper party or corporation, an action, in the proper court, against the person who has violated the by-law, to recover the penalty which it imposes, and this action may be either debt or assumpsit. By the common law, assumpsit may be maintained for the breach of any duty which the defendant has been legally liable to

¹ 5 and 6 Will. IV. chap. LXXVI. sec. 90. *Ante*, secs. 16, 270.

² *Ib.* sec. 91; secs. 127-133. *Supra*, sec. 271.

³ Rawlinson on Corp. (5th ed.) 167, note. See *Adley v. Reeves*, 2 Maule & Sel. 61; *Bodwic v. Fennell*, 1 Wils. 233. On the other hand, Mr. Grant is of opinion that the remedy prescribed by the act is exclusive, and supercedes the common law remedy of debt or assumpsit for the amount of the fine or penalty. *Grant on Corp.* 364. *Supra*, secs. 271 275.

perform in favor of the plaintiff, the law implying a promise to perform the particular act, and hence no principle was violated in holding that assumpsit would lie to recover the penalty of a by-law. As the penalty was for a sum certain, and was considered to be in the nature of liquidated damages, an action of debt would also lie to recover the amount of the penalty; but where the by-law itself provided that the penalty should be recovered by debt, then that form of action alone could be maintained. But, aside from statute authority or a valid custom, it was not competent for the by-law to provide that its penalty should be recovered by "distress and sale" of goods, that being contrary to the common law.¹

§ 343. In *this country*, the courts hold that where the mode of enforcement is prescribed by the charter, that mode must be pursued;² but if the mode or form of action is not prescribed, then the recovery of the penalty or fine for the violation of a municipal ordinance may be as at common law, by an act of debt or assumpsit, or where these forms are abrogated, by a civil action in substance the same.³

¹ Willc. 164-181; 1 Saund. Pl. and Ev. 683; 2 Wheat. Selw. 1178; 2 Chitty Pl. 401, where form of declaration in debt is given; *Adley v. Reeves*, 2 M. & S. 60. The law implies a promise on the part of a corporator to pay all penalties incurred for his violation of by-laws; and if the mode of enforcing such penalties is not pointed out, the corporation may sue therefor in any competent court. *Columbia v. Harrison*, 8 Const. (South Car.) Rep. 213, *per Nott, J.* *Supra*, secs. 270-280.

² *Weeks v. Foreman*, 1 Harris. (N. J.) 237, 1837; *Ewbanks v. Ashley*, 36 Ill. 177, 1864; *Israel v. Jacksonville*, 1 Scam. (Ill.) 290; *Williamson v. Commonwealth*, 4 B. Mon. 146, 151, 1843. An action may be brought for the fines and penalties incurred for the violation of ordinances, and it is not necessary that the fine be assessed before the suit is brought. *King v. Jacksonville*, 2 Scam. (Ill.) 306. In *Weeks v. Foreman*, 1 Harris. (N. J.) 237, 1837, it was held that, although certain corporate officers were *ex officio* justices of the peace within the city, with power to take cognizance of violations of by-laws, they could not entertain or try actions of *debt*, to recover a debt or penalty for a breach of an ordinance, although it was conceded that they had jurisdiction of the *quasi* criminal proceeding, founded upon a complaint or information, resulting in what is technically called a *conviction*; but *quære*. *Supra*, secs. 270-287.

³ *Ewbanks v. Ashley*, 36 Ill. 178, 1864; *Israel v. Jacksonville*, 1 Scam. (Ill.) 290; *Coates v. Mayor*, 7 Cow. 585, 608, 1827. Unless it is otherwise

And where such an action is brought, the proceeding is civil and not criminal, and the rules of procedure in civil cases, unless otherwise provided, are applicable to it.¹ The penalties to ordinances are often fixed upon a movable scale, and this would appear to be done under the supposition that they will be enforced, not by a common law action in the common law courts to recover the amount of the penalty, but by a complaint or proceeding before the proper municipal magistrate, who will, within the prescribed limits, determine the amount of the fine or penalty to be paid, by reference to the circumstances of the particular case.

§ 344. *Nature of Proceeding, Civil or Criminal.*—Where, instead of a civil action to recover the pecuniary fine or penalty, the proceeding is in the nature of a complaint for the violation of the ordinance, this has sometimes been considered to be a criminal or *quasi* criminal, and not a civil, proceeding. The cases on this subject, however, are not harmonious, but the difference in them, to some extent, depends upon the character of the act or offence charged, the nature of the charter, and the legislation in the particular state as to the extent of jurisdiction intended to be conferred upon the municipal authorities.² The constitution of Georgia declares that “trial by jury, as heretofore used in this state, shall remain inviolate.” It was claimed that the legislature could not constitutionally confer on the city council the power to pass an ordinance inflicting a fine for its violation where the guilt of the party was to be tried by the council, without a jury. The court held that the objection was not sound, observing that violations of ordinances

provided by statute or charter, it is considered that corporations have an inherent power to provide for the recovery of a penalty by an action of debt in their own courts. *Heaketh v. Braddock*, 3 Burr. 1858; *Barter v. Commonwealth*, 3 Pa. (Pen. & W.) 253. *Supra*, sec. 275.

¹ *Id.*; *Municipality v. Cutting*, 4 La. An. 335; *Lewiston v. Proctor*, 23 Ill. 533, 1860; *Quincy v. Ballance*, 30 Ill. 185; *Davenport v. Bird*, Iowa Supreme Court, December Term, 1871; *Williamson v. Commonwealth*, 4 B. Mon. 146, 151, 1848.

² *Wayne County v. Detroit*, 17 Mich. 390; *People v. Detroit*, 18 Mich. 445; *Davenport v. Bird*, 34 Iowa, December Term, 1871. See chapter on Municipal Courts, *post*. *Supra*, secs. 281, 300.

are not *criminal cases* within the meaning of the state constitution, and "that, inasmuch as the right of trial by jury existed in England, and was secured by *Magna Charta*, and municipal corporations in that country enforced their by-laws by *pecuniary penalties, in a summary manner*, and the same right being conferred upon similar corporations in this state anterior to the adoption of the constitution, and constantly exercised, "the right of trial by jury, as heretofore used in this state," was not violated by the city council of Augusta, by the imposition of the penalty for the breach of the *local police* regulations of that city."

§ 345. On the other hand, in Massachusetts, prosecutions for breaches of by-laws or ordinances made to enforce police regulations are regarded as substantially *public* prosecutions, and in such prosecutions it is competent, though confessed not to be very just, to disallow the defendant costs. Applying this doctrine, it is held that a statute providing that prosecutions for violations of city

¹ *Williams v. Augusta* (gunpowder ordinance), 4 Geo. 509, 1848, *per Warner, J.*, approving *Low v. Commissioners of Pilotage*, R. M. Charl. (Geo.) 316; *Flint River Steamboat Company v. Foster*, 5 Geo. 194; *Floyd v. Commissioners, &c.*, 14 Geo. 354; *Kip v. Patterson*, 2 Dutch. (N. J.) 298; *Keeler v. Milledge*, 4 Zab. 142; *Shafer v. Mamma*, 17 Md. 331. "Summary convictions for petty offences against statutes were always sustained, and they were never supposed to be in conflict with the common law right to a trial by jury." *Per Strong, J.*, *Byers v. Commonwealth*, 42 Pa. St. 89, 94, 1862. In the case last cited, the extent of the right of jury trial at common law is learnedly examined by Mr. Justice *Strong*. See, also, *Dunsmore's Appeal*, 52 Pa. St. 374; *Rhines v. Clark*, 51 Pa. St. 96, 1865. Compare, *Plimpton v. Somerset*, 33 Vt. 283, 1860. See *post*, *Municipal Courts*. A statute requiring security for costs, in prosecutions for "penal statutes," does not embrace prosecutions under city ordinances which impose penalties for their violation, such ordinances not being "statutes" within the meaning of the act. *Lewistown v. Proctor*, 23 Ill. 533, 1860; *S. P. Quincy v. Bailance*, 30 *Ib.* 185. And see, also, *Municipality v. Cutting*, 4 La. An. 335; *Ewbanks v. Ashley*, 36 Ill. 177; *Wayne County v. Detroit*, 17 Mich. 390; *People v. Detroit*, 18 Mich. 465, construing the phrase "penal laws" as used in the Michigan constitution. Phrase "municipal fine," in the constitution of California, construed. *People v. Johnson*, 30 Cal. 98, 1866. Violations of ordinances imposing fines and penalties are in the nature of torts, and actions for such violations may be prosecuted against one or more of the offending parties—they need not all be joined. *President, &c. v. Holland*, 19 Ill. 271, 1857.

ordinances in the name of the state or commonwealth is not unconstitutional, notwithstanding the result is that the defendant does not recover costs on acquittal.¹

§ 346. *Mode of Pleading Ordinances.*—The courts, unless it be the courts of the municipality, do not judicially notice the ordinances of a municipal corporation, unless directed by charter or statute to do so.² Therefore, such

¹ Goddard, Petitioner, 16 Pick. 504, 1835; Commonwealth v. Worcester, 8 Pick. 462. "If," says Chief Justice Shaw, in the case first cited, "the prosecution were to enforce a *private* right by the city, there would be weight in the objection, and it would stand on different grounds." 16 Pick. 508. See Commonwealth v. Gray, 5 Pick. 44; Commonwealth v. Fakey, 5 Cush. 408. Similar observations in relation to making sidewalks, by Ford, J., in Paxon v. Sweet, 1 Green (N. J.) 196, 200, 1832. So, in New Hampshire, a public prosecution for an offence made penal by a city ordinance because of its supposed evil consequences to society—as, for example, the offence of unlawfully keeping a bowling alley—is considered to be a criminal, and not a civil, proceeding. State v. Stearns, 11 Fost. (N. H.) 106, 1855. Fink v. Milwaukee, 17 Wis. 26, 1863, is decided upon the basis that a prosecution of a party for the violation of a city ordinance, where the penalty is a fine, is a criminal prosecution to which the bill of rights applies, which declares that, "in all criminal prosecutions, the accused shall be entitled to demand the nature and cause of the accusation against him." But a principle so broad, it is believed, can hardly be maintained where the act charged is not a crime at common law or in its essential nature. See chapter on Municipal Courts, *post*. In Indiana an action to recover the penalty of a by-law, though a warrant for the arrest of the defendant be issued and served, is considered to be a *civil suit*, and governed by the rules of practice in such suits. Goshen v. Croxton, 34 Ind. 237, 1870. *Ante*, secs. 300–303, and notes.

² Trustees v. Leffler, 23 Ill. 90; Mooney v. Bennett, 19 Mo. 551, 1854; New Orleans v. Bondo, 14 La. An. 303, 1859; Harker v. Mayor, 17 Wend. 199, 1837; Case v. Mobile, 30 Ala. 538, 1857; People v. Mayor, &c. of New York, 7 How. Pr. R. 81, 1851; Cox v. St. Louis, 11 Mo. 431, 1848; Garvin v. Wells, 8 Iowa, 286; Goodrich v. Brown, 30 Iowa, 291, 1870. In England, when an action on a by-law founded on a custom is brought in a *court of the municipality* the court will take judicial notice of it, but in an action in the *Superior Courts* the custom and the by-law must be set out, for these courts will not take notice of them. Willc. 166, pl. 403; *Ib.* 172, pl. 423; *Ib.* 173, pl. 425; Broadnac's Case, 1 Vent. 196; Barber Surgeons v. Pelson, 2 Lev. 252; Norris v. Staps, Hob. 211. In Conboy v. Iowa City, 2 Iowa, 90, it was held that the mayor, on whom was conferred exclusive jurisdiction of the violation of the ordinances of the city, was authorized to take judicial notice, *ex officio*, of the city ordinances. The provision of a city charter that its published and printed ordinances shall be received in evi-

ordinances, when sought to be enforced by action, or when set up by the defendant as a protection, should be set out in the pleading. It is not sufficient that they be referred to generally by the title or section. It is, however, believed to be sufficient, in the absence of special legislative provision prescribing the manner of pleading, to set forth the legal substance of that part of the ordinance alleged to have been violated, it being advisable, for purposes of identification, to refer also to the title, date, and section. The liberal rules of pleading and practice which characterize modern judicial proceedings should extend to, and doubtless would be held to embrace suits and prosecutions to enforce the by-laws or ordinances of municipal corporations.¹

§ 347. *Requisites of Complaints.*—Under a charter authorizing “complaint” to be made of the violation of ordinances, but not prescribing the mode or requisites, a complaint is not in the nature of an information by a common informer, and the same strictness is not required as in an information or indictment. “It is sufficient if it sets out with clearness the offence charged, and the substance of that part of the ordinance which has been violated, with a reference to the title, date or section.”²

dence in all courts without proof, does not dispense with the necessity of making them part of the record in order to bring them to the knowledge of an appellate court. *Cox v. St. Louis*, 11 Mo. 431, 1848; *New Orleans v. Boudo*, 14 La. An. 303, 1859.

¹ *Harker v. Mayor, &c.* 17 Wend. 199, 1837. See *Stokes v. Corporation of New York*, 14 Wend. 87; *Mooney v. Kennett*, 19 Mo. 551, 1854. In justifying, the defendant must set out in his plea or answer the ordinance, or so much thereof as will show on what the defence rests. *Id.*; *Keeler v. Milledge*, 4 Zabr. (N. J.) 142, 1857. It is sufficient to set out the substance of that part of the ordinance which has been violated, with a reference to the title, date, and section. *Id.*; approved, *Kip v. Patterson*, 2 Dutch. (N. J.) 298. Regularly, the by-law or its substance should be set forth. *Case v. Mobile*, 30 Ala. 538, 1857; *Charleston v. Chur*, 2 Bailey (South Car.) 164. In England, the by-law itself must be fully set out in an action of *debt* upon it, and not by way of recital; but in *assumpsit* upon the same by-law, latitude is allowed. Willcock, 173, pl. 425. But in this country it is said that “it is not necessary to hold to the strictness anciently required.” *Keeler v. Milledge*, 4 Zabr. 142. In Indiana, before the act of 1867, it was necessary to file with complaint copy of ordinance or section thereof alleged to have been violated. *Green v. Indianapolis*, 25 Ind. 490; *Whitson v. Franklin*, 34 Ind. 392, 1870.

² *Keeler v. Milledge*, 4 Zabr. (N. J.) 142, 1857; approved, *Kip v. Patter-*

§ 348. In an action or proceeding to recover a penalty for the violation of a by-law or ordinance of a corporation, the *declaration or complaint* should state facts which make the liability of the defendant distinctly to appear.¹ And regularly, as before stated, the by-law should be set forth

son, 2 Dutch. 298; City Council v. Seeba, 4 Strob. (South Car.) Law, 319; Commonwealth v. Bean, That. 85; compare, Fink v. Milwaukee, 17 Wis. 26, 1863; see, also, Commonwealth v. Bean, 14 Gray, 52; Deitz v. City, 1 Colorado, 323; Napman v. People, 19 Mich. 352, 1869; Goshen v. Croxton, 84 Ind. 239, 1870; Whitson v. Franklin, 84 Ind. 392, 1870. By statute, prosecutions for the violations of the ordinances of Boston may be prosecuted in the name of the commonwealth; and it is decided that in a complaint for such a violation it is not sufficient that it concludes "against the form of the by-laws of the said city," but it must conclude also against the form of the statute. Commonwealth v. Gay, 5 Pick. 44, 1827; Commonwealth v. Worcester, 3 Pick. 462, 1826. Complaint must be in the name of the treasurer of the city or town, and not in that of the commonwealth, for violation of health ordinances, since the statute of 1849. Chap. CCXI. sec. 7; Commonwealth v. Fakey, 5 Cush. 408, 1850. Police-men, marshals, and other officers of a municipal corporation, where such a course is not repugnant to the constitution or general law of the state, may be empowered by an ordinance to *arrest* offenders *without warrant*, for breaches of ordinances committed in their presence. Bryan v. Bates, 15 Ill. 87; Main v. McCarty, 15 Ill. 442; State v. Lafferty, 5 Harring. (Del.) 491. A city ordinance providing that any person who shall refuse to obey an order at a fire given by any officer duly authorized, "may be arrested and detained in custody *until the fire is extinguished*," is unconstitutional, because the person is deprived of his liberty without due process of law, and because his right to trial by jury is invaded. The court distinguish between an arrest of this kind and where the purpose of the arrest is preliminary to and contemplates a judicial examination. Judson v. Reardon, 16 Minn. 431, 1871. *Ante*, secs. 149, 150; Mitchell v. Lemon, 34 Md. 176, 1870; Butolph v. Blust, 5 Lansing (N. Y.) 84, 1871. Requisites of *warrants* for the violation of municipal ordinances. White v. Washington, 2 Cranch Cir. C. 337. Other cases: *Ib.* 356; *Ib.* 459; 4 *Ib.* 103; *Ib.* 582; Prells v. McDonald, 7 Kansas, 426, 1871. Sufficiency of *notice* to the accused under special charter provisions. 4 Zab. 142, *supra*. Essentials of summary convictions. Commonwealth v. Borden, 61 Pa. St. 272.

¹ Saund. Pl. & Ev. 324; Comyn Dig. tit. Pleader (2 W. 11); Feltmakers v. Davis, 1 Bos. & Pul. 93; Piper v. Chappell, 14 M. & W. 623; Case v. Mobile, 30 Ala. 538, 1857; Coates v. Mayor, 7 Cow. 585, 608, 1827, where the substance of a declaration in debt is given; Charleston v. Chur, 2 Bailey (South Car.) 164; Krickle v. Commonwealth, 1 B. Mon. 361, 1841. Pleader need not negative exception in a proviso to the enacting clause of an ordinance or in a subsequent section, this being a matter of defence. Lynch v. People, 16 Mich. 472, 1868. The conviction must be for the same offence for which the defendant is prosecuted. Columbus v. Arnold, 30 Geo. 517.

or its substance stated, the breach and the plaintiff's right to sue for the penalty. But where the charter or organic act of the corporation will be judicially noticed, it cannot be necessary to set out, as it has been held to be in England, the authority of the corporation to make the by-law.¹

§ 349. Where the penalty is given in general terms, it is understood to be to the use of the corporation, and the action or prosecution must be by and in the *name* of the corporation.² In England it was the practice, in many cases, to appoint in the by-law the penalty to be sued for in the name of the chamberlain, treasurer, or some other officer of the corporation, and though the power of thus suing for the penalty could not be given to a mere stranger, yet it was not absolutely necessary that the penalty should be given to the corporation, but it might be given to the informer.³ Whenever the mode of enforcing obedience to a by-law is prescribed by such by-law, that mode must be strictly pursued, and the plaintiff (where the rules of common law pleading prevail) must be the party to whom the penalty is given. Where it is given to the chamberlain for the use of the corporation, the action must be in the name of the chamberlain, and not in that of the corporation. And when the chamberlain may sue, he need not set out his election or appointment, but may aver generally that he is chamberlain, and set forth his right to sue and to recover.⁴ Unless the ordinance show that it was intended that no action for a penalty should lie without a previous demand, it is not necessary to aver one.⁵ Nor is it necessary

¹ *Norris v. Staps*, Hop. 211.

² *Bodwic v. Fennell*, 1 Wils. 233; *Vintners' Co. v. Passey*, 1 Burr. 235; *Glover*, 313; 2 Kyd, 157; *Graves v. Colby*, 9 Ad. & El. 356; *Williamson v. Commonwealth*, 4 B. Mon. 146, 151, 1843. *Ante*, chap. VIII.

³ *Glover*, 313, 314, 315; *Feltmakers v. Davis*, 1 Bos. & P. 101; *Bodwic v. Fennell*, 1 Wils. 233; *Tottendell v. Glazby*, 2 Wils. 266; *Hesketh v. Braddock*, 3 Burr. 1848; *Wood v. Searl*, Bridg. 141; *Graves v. Colby*, 9 Ad. & El. 356.

⁴ *Harris v. Wakeman*, Say. 255; *Exon v. Starre*, 2 Show. 159. Under constituent act, town treasurer held entitled to sue in his own name for penalties. *Watts v. Scott*, 1 Dev. (North Car.) 291; *Commonwealth v. Fakey*, 5 Cush. 408, 1850.

⁵ *Butchers v. Bullock*, 3 Bos. & P. 434, 437.

to aver that the defendant had notice of the ordinance, for this is conclusively presumed with respect to all on whom it is binding.¹

§ 350. *Mode of Procedure, Defences, Evidence, &c.*—In prosecutions to enforce ordinances, the *ordinary rules of evidence* apply, except so far as specially modified by statute; and it is not competent for a municipal corporation, without express authority, to make or alter the rules of evidence or of law.² It is, however, competent for a city to provide by general ordinance, after suit commenced to recover a penalty for acting without a license, that the granting of a license, though by its terms it takes effect from a day previous to the commission of the offence, shall not (as might otherwise be the case) *release or waive the penalty.*³

§ 351. In proceedings to enforce ordinances, the *illegality* of the *corporate organization* cannot be shown to defeat a recovery; in such a collateral proceeding, evidence that the corporation is acting as such is all that is required.⁴

§ 352. The legislature may ratify ordinances not otherwise binding; and offenders should thereafter be prosecuted under the *ordinances*, and not under the validating act.⁵

§ 353. In prosecutions or actions to enforce ordinances, or in considering the question of their validity, courts will

¹ *London v. Barnardston*, 1 Lev. 16; *James v. Putney*, Cro. Car. 498.

² *City Council v. Dunn*, 1 McCord (South Car.) 333; *Fitch v. Pinckard*, 4 Scam. (Ill.) 78. The defendant's admission of a violation of an ordinance is competent evidence. *Columbia v. Harrison*, 2 Const. R. (South Car.) 213, 1818.

³ *City Council v. Smidt*, 11 Rich. (South Car.) Law, 343; *City Council v. Corlies*, 2 Bailey (South Car.) 189. Commented on by *O'Neill, J.*, in *City Council v. Feckman*, 3 Rich. (South Car.) Law, 385. And see case last cited as to other circumstances, in which it was held that a prior penalty was not waived by a subsequent acceptance of the amount of a license for a year.

⁴ *Hamilton v. Carthage*, 24 Ill. 22; *Mendota v. Thompson*, 20 Ill. 197. *Coles County v. Addison*, 23 Ill. 337; *Decorah v. Gillis*, 10 Iowa, 234; *Kettering v. Jacksonville*, 50 Ill. 89; *Tisdale v. Minonk*, 46 Ill. 9, 1867.

⁵ *Truchelut v. City Council*, 1 Nott & McC. (South Car.) 227, 1818. *Ante*, chap. IV. sec. 46, and note.

give them a *reasonable construction*, and will incline to sustain rather than to overthrow them, and especially is this so where the question depends upon their being reasonable or otherwise. Thus, if by one construction an ordinance will be valid, and by another void, the courts will, if possible, adopt the former. But an ordinance which transcends the power vested in the body which passed it is void, and may be taken advantage of by plea or answer to an action to recover the penalty or other proceedings to enforce it.¹ Its validity may also be tested in proper cases by suits against the corporation or its officers for acts done under it,²

¹ *Commonwealth v. Robertson*, 5 Cush. 438, 442, 1850; *Vintners v. Passey*, 1 Burr. 239; *Poulters Co. v. Phillips*, 6 Bing. (N. C.) 314, 323; *Tailors of Ipswich*, 11 Rep. 54, *a*; *Norris v. Staps*, Hob. 211; *Tobacco, &c. Co. v. Woodroffe*, 7 B. & C. 838; *Moir v. Munday*, Sayer, 181, 185; *Rounds v. Mumford*, 2 Rh. Is. 154, 1852. Where the legislature has conferred full and exclusive jurisdiction on a municipal corporation over a certain subject, the acts of the corporation will be supported by every fair intendment and presumption. *Baltimore v. Clunet*, 22 Md. 449, 1865. In view of the inartificial character of town by-laws, they are especially entitled to a reasonable construction. *Whitlock v. West*, 26 Conn. 406; *Willc. Mun. Corp.* 159, pl. 382. By-laws with penalties are not properly penal statutes. The penalty is in the nature of liquidated damages, established as such in lieu of damages which a court would be authorized to assess. Therefore the strict rules by which the validity of penal statutes are to be tested are not to be applied to the by-laws or ordinances of municipal corporations. It is well remarked, that "the by-laws of very few of these corporations could stand such a test. They should receive a reasonable construction, and their terms must not be strictly scrutinized for the purpose of making them void." *Per Hustis*, C. J., *Municipality v. Cutting*, 4 La. Ann. 335; *Merriam v. New Orleans*, 14 Ib. 318; *S. P. Loze v. Mayor, &c.*, 2 La. 427. If, however, the ordinance is, in its nature, highly penal, it will be construed strictly, and it must clearly embrace the offence charged. *Krickle v. Commonwealth*, 1 B. Mon. 261, 1841. Contemporaneous construction often of great weight in interpreting doubtful provisions. *State v. Severance*, 49 Mo. 401, 1872. *Ante*, sec. 57, note, sec. 125, note.

² *Moir v. Munday*, Sayer, 181, 185. See protective provisions to corporate officers and agents in *Municipal Corporations Act*, 5 and 6 Will. IV. chap. LXXVI. secs. 132, 133. In the *Canadian Municipal Act* (sec. 198, Harrison's *Munic. Man.* 2nd ed. p. 145), there is what the author would suppose to be a very useful provision to test summarily the validity of by-laws, to the effect that a resident of a municipality or any other person interested in a by-law, order or resolution may, within one year, apply to either of the Superior Courts of Common Law to have it quashed, and the court, after notice to the corporation, may quash the by-law, order or resolution, in whole or

or by a return to a *mandamus* where the party justifies his refusal to comply with the writ, on the ground that the ordinance is invalid,¹ or, as elsewhere shown, by bill in chancery to enjoin proceedings thereunder.

§ 354. If *part of a by-law be void*, another essential and connected part of the same by-law is also void.² But it must be essential and connected to have this effect. Thus, if an ordinance, or even the same section of an ordinance, contains two separate prohibitions relating to different acts, with distinct penalties for each, one of which is valid and the other void, the ordinance may be enforced as to that portion of it which is valid.³

in part, for illegality; and it is further provided (sec. 205), that in case anything has been done under such illegal by-law, order or resolution, which gives any person a right of action, no action shall be brought until one month's notice thereof be given to the corporation, and such action must be brought against the corporation and not against any person acting under the by-law, order or resolution. Construction of provision, see Harrison's *Munic. Man.* (2nd ed.) pp. 148, 153.

¹ *Rex v. Harrison*, 3 Burr. 1322; Grant on Corp. 89. An ordinance may be void for uncertainty in its provisions, as, for example, one which alters street grades, without referring to any plan or establishing new grades. *Kearney v. Andrews*, 2 Stock. (N. J.) 70.

² *Austin v. Murray*, 16 Pick. 121, 126, 1834; Com. Dig. By-law, chap. VII.; *Rex v. The Company, &c.*, 8 Term R. 356. See *Commonwealth v. Stodder*, 2 Cush. 562, 1848; *Fisher v. McGirr*, 1 Gray, 1; *Warren v. Mayor, &c.*, 2 Gray, 84; *Commonwealth v. Hitchings*, 5 Gray, 482.

³ *Commonwealth v. Dow*, 10 Met. 382, 1845; *Amesbury v. Insurance Co.* 6 Gray, 596; *Shelton v. Mayor of Mobile, &c.* (market ordinance), 30 Ala. 540, 1857; *Rogers v. Jones*, 1 Wend. 237; *Thomas v. Mount Vernon*, 9 Ohio, 290; 1 Stra. 469; Sir T. Raym. 288, 294; Sayer, 256; 1 B. & Ad. 95; 7 Term R. 549. "If a by-law be entire, each part having a general influence over the rest, and one part of it be void, the entire by-law is void." Willcock on Corp. 160, pl. 384; approved *Municipality v. Morgan*, 1 La. An. 111, 116, 1846. "But if a by-law consist of several distinct and independent parts, although one or more of them may be void, the rest are equally valid, as though the void clauses had been omitted." Willcock, 161, pl. 389; *Fazakerly v. Willshire*, 11 Mod. 353; *Lee v. Wallis*, 1 Kenyon, 295. In a leading case, *Rex v. The Co. of Fishermen*, 8 Term R. 356, Lord Kenyon said: "With regard to the form of the by-law indeed, though a by-law may be good in part and bad in part, yet it can be so only when the two parts are entire and distinct from each other." Approved, *Municipality v. Morgan*, 1 La. An. 111, 116, 1846. It is stated in Grant on Corporations, 88, that it is

§ 355. When not specially regulated by charter or statute, the *proof of ordinances* must be by the production of the originals or the books in which they are registered, as these are the primary evidence.¹ Printed copies, or authenticated copies, are often made competent evidence by the legislature.

"now fully settled that a by-law that is void in part is void wholly; *e. g.* if the penalty be unreasonable the rest of the by-law is vitiated thereby, and becomes wholly inoperative and null." Citing Com. Dig. By-Law, chap. VII.; Colchester *v.* Godwin, Carter, 121; Ellwood *v.* Bullock, 6 Queen's B. 883; Clarke *v.* Tuckett, 2 Vent. 182; Rex *v.* Atwood, 4 B. & Ad. 481. But the rule in the text is well sustained, and is reasonable; and it is not true that the void part of a by-law will make null complete and independent parts of the same by-law which would otherwise be good.

¹ Lumbar *v.* Aldrich, 8 N. H. 31; Stevens *v.* Chicago, 48 Ill. 498; Moore *v.* Newfield, 4 Greenl. (Me.) 44; Hallowell Bank *v.* Hamlin, 14 Mass. 178; Case of Thetford, 12 Vin. Abr. 90. See chapter on Corporate Records and Documents, *ante*. Proof may be made by the clerk that he posted up copies of an ordinance appearing on the records, without producing such copies or accounting for their absence. Teft *v.* Size, 5 Gilm. (Ill.) 432. As to promulgation and publication of ordinance. Charleston *v.* Chur, 2 Bailey (South Car.), 164; Kittering *v.* Jacksonville, 50 Ill. 39. *Supra*, secs. 265-269.

Where the charter provides that the printed volume of City Ordinances shall be evidence in all courts, the ordinances printed therein will be judicially noticed the same as public statutes. Napman *v.* People, 19 Mich. 352, 1869. *Ante*, sec. 50.

CHAPTER XIII.

MUNICIPAL COURTS.

Municipal Courts in England and at Common Law.

§ 356. A municipal corporation may, at common law, enjoy the franchise of holding a court; and corporation or municipal courts, which were local or inferior jurisdictions, were not uncommon.¹ They were treated as the tribunals of the corporation, but since courts of justice are for the public benefit, words in a charter permitting the corporation to hold a court are imperative;² and the right cannot be lost by non-user; and therefore the mere disuse, for two hundred years, of a court granted to a corporation by charter, is no answer to a rule for a *mandamus* commanding them to hold it, though it was alleged that there were no sufficient funds for the purpose.³

The common law doctrine respecting municipal courts was settled to be that the municipal corporation could bring no action therein against a stranger where the effect would be to benefit the corporation or increase its funds, for that would be to make the corporation itself both judge and party, which an inflexible and fundamental maxim of the common law prohibited; and the same principle was considered to operate to disqualify corporators to sit as jurors in such cases; but this objection did not apply when both parties were corporators.⁴

The English Municipal Corporation Act of 1835 provides for the establishment of *borough courts*, defines their jurisdiction and powers, makes burgesses or citizens competent

¹ 1 Inst. 114; 4 *Ib.* 87, 224; Cro. Jac. 313; Haddock's Case, T. Raym 485.

² Rex v. Mayor, &c. of Hastings, 5 B. & Ald. 592; Grant on Corp. 34.

³ Regina v. Mayor, &c. of Wells, 4 Dowl. P. C. 562.

⁴ Hesketh v. Braddock, 3 Burr. 1856-1868; Grant on Corp. 194; London v. Wood, 12 Mod. 674; 1 Salk. 398; Bosworth v. Budgen, 7 Mod. 461; Rex v. Rogers, 2 Ld. Raym. 778; Willc. on Corp. 157, 165.

jurors, contains an express provision that no witness or magistrate shall be incompetent or disqualified by reason of his being liable to contribute to the fund of the corporation, and regulates in general the proceedings therein for violation of by-laws or ordinances, and the collection and enforcement of penalties.¹

It may, however, be observed that the power to make by-laws is limited, and does not extend to acts criminal in their nature, and which are punishable by criminal statutes in force throughout the municipality.

American Corporation Courts—Constitutional Provisions.

§ 357. In this country it is usual to provide in the charter or organic act of a municipal corporation for a local or special tribunal, called by different names, such as the mayor's court, recorder's court, city court, and the like; and which is invested with jurisdiction over complaints and prosecutions for the violation of the ordinances of the corporation, and often, for public convenience, with special civil and limited criminal jurisdiction under the laws of the state.

It is competent for the legislature to provide for the establishment of these inferior courts, and to invest them with such measure of power and jurisdiction as may be deemed expedient, if no provision of the constitution of the particular state be infringed.²

¹ 5 and 6 Will. IV. chap. LXXVI. secs. 90, 91–118–184, 1835.

² *State v. Mayor of Charleston*, 14 Rich. (So. Car.), Law, 480; *State v. Helfrid*, 2 Nott & McCord, 238, 1820. Full discussion of legislative power to create *inferior courts*, and define jurisdiction. *Ib.*; *Gray v. The State*, 2 Harring. (Del.) 76, 1835. Mayor's court an *inferior* court within meaning of state constitution. *Ib.*; *Egleston v. City Council*, 1 Const. (So. Car.) R. 45, 1818. As to official character of city recorder. *Ib.*; *Schroder v. City Council*, 2 Const. R. 726; S. C., 3 Brev. 538; *Tesh v. Commonwealth*, 4 Dana, 522; *Nugent v. The State*, 18 Ala. 521, 1821. Holding the city court of Mobile, which is invested with criminal jurisdiction, and from whose judgment an appeal lies, to be constitutional, and defining meaning of *inferior court*. *Ib.*; *New Orleans v. Costello*, 14 La. An. 37; *Myers v. People*, 26 Ill. 173; *Davis v. Woolnough*, 9 Iowa, 104; *People v. Wilson*, 15 Ill. 389; *State v. Maynard*, 14 Ill. 420; *Beesman v. Peoria*, 16 Ill. 484; *Holmes v. Fihlenburg*, 54 Ill. 203, 1870; *Van Swartow v. Commonwealth*, 24 Pa. St.

358. We have elsewhere shown that the courts have uniformly held that it was competent for the state legisla-

181. 1854; *Tierney v. Dodge*, 9 Minn. 166; *Burns v. La Grange*, 17 Texas, 415, 1856; *Ex parte Slattery*, 8 Ark. 484; *Id.* 561; *Graham v. State*, 1 Pike (Ark.) 171; *Floyd v. Commissioners*, 14 Geo. 854, 1853; *State v. Gutierrez*, 15 La. An. 190; *Muscatine v. Steck*, 7 Iowa, 505; *Richmond Mayoralty Case*, 19 Gratt. (Va.) 673, 1870. The superior court of the city of San Francisco is constitutional. *Seale v. Mitchell*, 5 Cal. 403; *Vassault v. Austin*, 36 Cal. 691; *Hickman v. O'Neal*, 10 Cal. 294. The constitution of California, as amended in 1862, authorized the legislature to establish "recorder's or other inferior courts in any incorporated city or town;" and it was held, in view of the prior decisions in the state just cited, that the municipal criminal court of the city and county of San Francisco was an *inferior* court, and constitutional. *People v. Nyland*, 41 Cal. 129, 1871; *Stratman, Ex parte*, 89 Cal. 517, 1870. The Hustings Court of Richmond is constitutional. *Chahoon's Case*, 21 Gratt. (Va.) 822, 1871; *Richmond Mayoralty Case*, 19 Gratt. (Va.) 673, 1870.

Under a *constitutional provision* declaring that "the *judicial power* shall be vested in a Supreme Court, in district courts, and in justices of the peace," an act conferring judicial powers on the mayor of a city was considered void, and it was held that for violations of its ordinances the corporation should resort to the judicial tribunals organized under the constitution. *Lafon v. Dufrocq*, 9 La. An. 850, 1854. But see *The State v. Young*, 8 Kansas, 445, 1866, where a provision in an organic act that the judicial power shall be vested exclusively in a Supreme Court, district, probate, and justice courts, was held not to prohibit the legislature from establishing municipal courts for the enforcement of municipal regulations and ordinances. And this seems to be the correct view. *Shafer v. Mumma*, 17 Md. 881. In *Hutchins v. Scott*, 4 Halst. (N. J.) 218, 1827, the objection was made that the legislature could not constitutionally confer the powers of *justices of the peace on the mayor, recorder, or aldermen of a city or borough*, the argument being that since the constitution provided for the appointment of justices of the peace only, and not for corporate officers, officers exercising the authority and powers of a justice of the peace should be appointed as such; but the objection was not sustained. In Illinois, mayors of cities cannot, it is held, be constitutionally invested with judicial power. *The State, &c. v. Maynard*, 14 Ill. 420; *Beesman v. Peoria*, 16 Ill. 484. By the general law of Indiana of 1857, for the incorporation of cities, mayors, in addition to their duties proper, have, "within the limits of cities, the jurisdiction and powers of a justice of the peace in all matters, civil and criminal, arising under the laws of the state, and for crimes and misdemeanors a jurisdiction co-extensive with the county." The constitution of the same state (art. VII. sec. 16) declared that "no person elected to any *judicial office* shall, during the term, be eligible to any office of trust or profit under the state, other than a judicial office." One Wallace was elected mayor of Indianapolis, and within his term he resigned and received a majority of votes for sheriff of the county. It was held by the Supreme

tures to create municipal corporations with powers of local government, and to authorize them to adopt ordinances or

Court of Indiana (*Waldo v. Wallace*, 12 Ind. 569, 1859; *Gulick v. New*, 14 *Ib.* 93), that Wallace was a "judicial officer," and therefore ineligible to the office of sheriff; that the voters of the county were chargeable with notice of his ineligibility; that votes cast for him were therefore ineffectual, and that his competitor, having received the greatest number of *legal* votes, though not a majority of the ballots, was duly elected. Notwithstanding the great consideration which these cases received, I venture, with great deference, to state that it is by no means clear to my mind that the mayor was a "judicial officer" within the meaning of the constitution. See, as bearing upon the above decision, and illustrative of the nature of the office of mayor, *Howard v. Shoemaker*, 35 Ind. 111, 1871; *Morrison v. McDonald*, 21 Maine, 550, 1842; *State v. Maynard*, 14 Ill. 419, 1858; *Commonwealth v. Dallas*, 4 Dallas, 229; S. C. more fully, 8 Yeates, 300, 1801; *State v. Wilmington*, 3 Harring. (Del.) 294, 1839. Authority of a mayor under a statute investing him with the powers of a justice of the peace. *State v. Perkins*, 4 Zabr. (N. J.) 409; 1 Harr. (N. J.) 287. See *Baton Rouge v. Deering*, 15 La. An. 208. A constitutional provision as to eligibility "to the office of judge of any court of the state," &c., and requiring a two years' residence "in the division, circuit, or county," was considered to have no reference to the office of recorder of a city. *The People v. Wilson*, 15 Ill. 889.

The constitution of Nevada provided that "the legislature may also establish courts for *municipal purposes only*, in incorporated cities and towns," and it was held that an act authorizing the city recorder to exercise the duties of committing magistrates in respect to offences against the public laws of the state was in conflict with the constitution. *Meagher v. County*, 5 Nev. 244, 1869. The constitution of Maryland contains a provision that "the *judicial power* of the state shall be vested in a Court of Appeals, in circuit courts, in such courts for the city of Baltimore as may be hereafter prescribed, and in justices of the peace," and it was held that the legislature might authorize municipal courts to try and punish disorderly persons and lewd women within the corporate limits, and generally to authorize the corporate authorities to exercise *police powers*, which were distinguished from the ordinary judiciary powers of the state. *Shafer v. Mumma*, 17 Md. 831, 1861. Further as to construction of constitution of Maryland as to judicial powers of Mayors. *Hagerstown v. Dechert*, 32 Md. 369, 1869.

Under the constitution of North Carolina "special courts" are authorized "for the *trial* of misdemeanors in cities and towns where they may be necessary;" and it was held to be no objection to an act of the legislature that it did not authorize the officers of such court to *try* persons charged with misdemeanors, but only to bind them over. *State v. Pender*, 66 No. Car. 813, 1872. But under the constitution the legislature cannot confer upon mayors the judicial powers of justices of the peace in *civil* actions. *Edenton v. Wool*, 65 *Ib.* 379.

by-laws with appropriate penalties for their violation. The power to do this includes, by fair implication, the power to authorize violations of ordinances (where the acts are not criminal in their nature) to be tried and determined in a summary manner; by a local or corporation tribunal.

The distinction between statute law and municipal by-laws has been pointed out, and the subject of concurrent prohibitions of the same act by the general law and by the local ordinances of a municipality treated, in the chapter on Ordinances. The distinction is there drawn, and is to be observed between acts not essentially criminal, relating to municipal police, and those intrinsically criminal, and which are made punishable by the general laws of the state. The pecuniary penalties which are annexed to violations of the former class, the legislature may, we think, authorize the corporation to enforce in its own name, by civil action, or by complaint, and provision need not necessarily be made that they shall be prosecuted in the name of the people or of the state.¹

¹ *Barter v. Commonwealth*, 3 Pa. (Pen. & W.) 253; *Weeks v. Foreman*, 1 Harrison (N. J.), 237; *Ewbank v. Ashley*, 36 Ill. 177; *Williams v. Augusta*, 4 Geo. 509; *Floyd v. Commissioners*, 14 Geo. 354; *Kip v. Patterson*, 2 Dutch. (N. J.) 298; *Lewistown v. Proctor*, 23 Ill. 533; *State v. Jackson*, 8 Mich. 110. See *State v. Stearns*, 11 Fost. 106; *Goddard, Petitioner*, 16 Pick. 504; *Fink v. Milwaukee*, 17 Wis. 26.

The constitution of the state of Iowa contains this provision: "The style of all process shall be 'The State of Iowa,' and all *prosecutions* shall be conducted in the name and by the authority of the same." Constitution of Iowa, art. V. sec. 8. The charter of the city of Davenport, in terms, authorized *prosecutions* for violations of municipal ordinances to be instituted in the name of the city, and it was contended that this portion of the charter was in conflict with the above quoted provision of the constitution. But the Supreme Court, in the case of *Davenport v. Bird*, 4 Iowa, 524, 1871, held otherwise. It was a prosecution in the name of the city against the defendant for a violation of an ordinance of a police nature, but for which, under the charter, the city was authorized to punish by a limited fine and imprisonment. In giving the opinion of the court, *Miller, J.*, says: "Is it necessary, under the constitution, that all prosecutions for violations of municipal police ordinances shall be conducted *in the name and by the authority* of the state of Iowa? Or, in other words, is that clause of the city charter of Davenport, which directs that 'all suits, actions, and prosecutions be instituted, commenced, and prosecuted *in the name of the city of Davenport*,' in conflict with the constitutional provision before referred to? We are of opinion that it is not. This clause of the constitution occurs in

359. In creating local tribunals, however, and in prescribing their jurisdiction, it is essential that the legislature should keep in view two cardinal considerations: *First*. That these inferior courts will have only such jurisdiction, and can exercise only such powers, as are *expressly* given, or *necessarily* implied. Fair doubts as to the extent of jurisdiction are resolved against the corporation; to this effect are all the authorities. *Second*. Regard should also be had to constitutional provisions intended to secure the liberty and protect the rights of the citizen. The state constitutions contain the substance of the provisions of Magna Charta to the effect that no citizen shall be deprived of life, liberty, or property but by the judgment of his peers or by

art. V., which treats of the judicial department of the government. This article vests and defines the judicial power of the state, establishes the tenure of office of the judges, and defines the mode of their election; fixes their salary and limits the number of judicial districts; provides for the election of an attorney general, and other matters pertaining to the judicial arm of the state, among which is the clause under consideration. From all this, it seems manifest that the requirement 'that all *prosecutions* shall be conducted in the name of "The State of Iowa"' contemplates such criminal *prosecutions* as shall be instituted and prosecuted before the tribunals which are provided for in that article of the constitution under the statutes of the state. It is fitting and appropriate that prosecutions for violations of the criminal laws of the state should be carried on in the name of the government. But there is no fitness or propriety in requiring the state to be a party to every petty prosecution under the police regulations of a municipal corporation. Such a construction of this article of the constitution seems to us unwarranted, and not intended by the framers of the constitution. It was held by the Supreme Court of Pennsylvania that the word *process*, in the 12th section of the 5th article of the constitution of the state of Pennsylvania, which provides that 'the style of all process shall be the *Commonwealth of Pennsylvania*,' was intended to refer to such writs only as should become necessary to be issued in the course of the exercise of that *judicial power* which is established and provided for in the article of the constitution, and forms exclusively the subject matter of it. On the same principle, we are of opinion that the word 'prosecutions,' in the 8th section of article V. of our constitution, was intended to refer only to such criminal prosecutions under state laws as should be cognizable by the *judicial power*, which is established and provided for in that article, and that it was not intended to include prosecutions under ordinances of municipal corporations cognizable before local police magistrates."

And the same view is held by the Court of Appeals of Kentucky. *Williamson v. Commonwealth*, 4 B. Mon. 146, 1843. As to mode of enforcement and requisites of complaints, *vide* chapter on Ordinances, sec. 341.

the law of the land, and also provisions, more or less extensive, securing the right of trial by jury. These and other provisions of the fundamental law cannot be violated in acts of the legislature establishing and fixing the jurisdiction of the corporation court or tribunal.¹

Citizens Competent to be Local Judges, Jurors, and Witnesses.

§ 360. The maxim of the common law above adverted to, that no one shall be a judge in his own case, has no just application to legislation creating municipal courts, and investing them with jurisdiction to try complaints for breaches of municipal ordinances. The mayor, though a citizen of the corporation, may be clothed with judicial powers of this character, and the inhabitants, though interested in a minute degree in the recovery, are, or at least may be declared, competent witnesses. In this respect the common law rules have not been adopted and applied by the American courts to our municipal corporations.²

¹ *Zylstra v. The Corporation of Charleston*, 1 Bay, 382, 1794; *People v. Slaughter*, 2 Doug. (Mich.) 334, 1842.

² *Thomas v. Mount Vernon*, 9 Ohio, 290, 1839; *Commonwealth v. Read*, 1 Gray (Mass.) 475; *The Mayor v. Long*, 31 Mo. 369, 1861; *Commonwealth v. Ryan*, 5 Mass. 90; *Cooley Const. Lim.* 410, 412.

In *The City Council v. Pepper*, 1 Rich. (So. Car.) Law, 364, 1845, the defendant, a non-resident of the city, was prosecuted in the city court, established by act of the legislature, for violation of a city ordinance. The defendant made the point that as the judge of that court, the sheriff, and jurors were corporators, and therefore interested in the penalty, they were incompetent to try the cause. In holding this objection unsound, the Court of Appeals, after alluding to *Hesketh v. Braddock*, 3 Burr. 1847, relied on by the defendant, remarks: "The statutory authority given to the city court to try all offenders against city ordinances, impliedly declares that, notwithstanding the common law objection, it was right and proper to give it the power to enforce the city laws against all offenders. The interest is too *minute*, too slight, to excite prejudice against a defendant; for the judge, sheriff, and jurors are members of a corporation of many thousand members. What interest of value have they in a fine of twenty dollars? It would put a most eminent calculator to great trouble to ascertain the very minute grain of interest which each of these gentlemen might have. To remove so shadowy and slight an objection, the legislature thought proper to clothe the city court, consisting of its judge, clerk, sheriff and jurors, with authority to try the defendant, and he cannot now object to it." *Per*

Summary Proceedings may, in Certain Cases, be Authorized.—Jury Trial.

§ 361 Proceedings for the violation of municipal ordinances are frequently summary in their character, and it has been made a question how far statutes or charters authorizing such proceedings are valid, especially where no provision is made for trial by jury. This must depend upon the constitution of the state and the extent to which the power of the legislature is therein restricted. Offences against ordinances properly made in virtue of the implied or incidental power of the corporation, or in the exercise of its legitimate police authority for the preservation of the peace, good order, safety, and health of the place, and which relate to minor acts and matters not embraced in the public criminal statutes of the state, are not usually or properly regarded as *criminal*, and hence need not necessarily be prosecuted by indictment or tried by a jury.¹ An

O'Neill, J., *City Council v. Pepper*, 1 Rich. (So. Car.) Law, 364, 1845; *City Council v. King*, 4 McNott (So. Car.) 487; *Corwein v. Hames*, 11 Johns. 76, 1814. The mayor is not disqualified from presiding in the Mayor's Court, before which the proceedings are held, from the fact that he is the owner of a lot on the street sought to be widened. *The Mayor v. Long*, 31 Mo. 869, 1861.

¹ *Williams v. Augusta*, 4 Geo. 509, 1848; approved, *Floyd v. Commissioners*, 14 Geo. 358, 1853; *Vason v. Augusta*, 38 Geo. 542, 1868; *State v. Guttierrez*, 15 La. An. 190; *Tierney v. Dodge*, 9 Minn. 166, 186; *Byers v. Commonwealth*, 42 Pa. St. 89; 1 Bish. Cr. Pr. sec. 758; *State v. Conlin*, 27 Vt. 318. Thus, in New Jersey it is held that legislative authority to municipal courts to punish violations of ordinances by a limited fine and imprisonment, without providing for a trial by jury, is not in conflict with the constitutional provision that "the right of trial by jury shall remain inviolate." *McGear v. Woodruff*, 33 N. J. Law, 213, 1868; *Johnson v. Barclay*, 1 Harr. (N. J.) 1. *Ante*, secs. 800, 844, 345.

Treating of this subject, Mr. *Sedgwick* says: "Extensive and summary police powers are constantly exercised in all the states of the Union for the repression of breaches of the peace and petty offences; and these statutes are not supposed to conflict with the constitutional provisions securing to the citizens a trial by jury." Stat. and Const. Law, 548, 549; Cooley, Const. Lim. 596. In *Williams v. Augusta*, *supra*, proceedings before a city council for violations of its ordinances, although punishable by fine, were considered not to be "*criminal cases*" within the meaning of the constitution of Georgia, vesting the jurisdiction of all *criminal cases* in tribunals other than

act of the legislature authorizing the arrest of professional thieves and burglars frequenting any railroad depot, &c., in the city of Philadelphia, and their commitment by the mayor, without a trial by jury, is not in conflict with the provision of the constitution of the state, which guarantees "that trial by jury shall be as heretofore, and the right thereof remain inviolate."

corporation courts, the court being of opinion that the term "criminal cases," as used in the constitution, had reference to such acts and omissions as are in violation of the *public laws* of the state, and not to violations of local ordinances made for the internal police and government of the city. In the state last named the settled rule is that the same act cannot be twice punished—once by the municipality and once by the state—and the rule is adopted that the municipal power ends where the right to indict under state authority exists, as any other rule would deprive the accused of the right to a jury trial. *Jenkins v. Thomasville*, 85 Geo. 145, 1866; *Vason v. Augusta*, *supra*; *Savanna v. Hussey*, 21 Geo. 80, 1857. So in Michigan: *People v. Slaughter*, 2 Doug. (Mich.) 334, 1842. Otherwise in Kentucky: *Williamson v. Commonwealth*, 4 B. Mon. 146, 1843. *Ante*, secs. 302, 344.

Byers v. Commonwealth, 42 Pa. St. 89. In this case the extent of the right of trial by jury at common law is thoroughly examined in a valuable opinion by *Strong, J.*, now one of the justices of the Supreme Court of the United States, and the validity of summary convictions sustained. See chapter on Ordinances, *ante*. The doctrine may be considered as settled in Pennsylvania that municipal corporations are not within the constitutional guaranty of jury trial, and that the right to a trial by jury may be withheld by the legislature from *new offences*, and from *new jurisdictions* created by statute without common law powers, and from proceedings *out of the course of the common law*. *Rhines v. Clark*, 51 Pa. St. 96, 1865, *per Woodward, C. J.*; *Dunsmore's Appeal*, 52 Pa. St. 374, 1866; *Ewing v. Filley*, 43 Pa. St. 384, 1862; *Van Swartow v. Commonwealth*, 24 Pa. St. 131, 1854. See *Barter v. Commonwealth*, 3 Pa. (Pen. & W.) 253, 1881. A different view is, to some extent, taken by the Supreme Court of Vermont under the constitution of that state, whose language is, that "when an issue of fact *proper for cognizance* of a jury shall be joined in a court of law, the parties *have* a right to trial by jury which ought to be held sacred." In the opinion of the court, a public corporation, although the liability on the corporation be created by statute, is entitled to a jury trial, and therefore a statute providing for a compulsory and final reference of a case, in its nature one at common law, is void, and the constitution applies to all controversies fit to be tried by a jury, although the particular right was created by statute enacted after the adoption of the constitution. *Plimpton v. Somerset*, 33 Vt. 283, 1860. It would, perhaps, be going too far to say that municipal corporations are not in any case within the constitutional guaranty of a trial by jury, and yet it would not follow that provision might not be made

§ 362. But where the legislature undertakes to confer upon the courts of the corporation, or where the corporation seeks to give its court summary jurisdiction to *try* persons for acts which are indictable, or are criminal offences, it not unfrequently happens that some provision of the constitution, designed to protect the rights or liberty of the citizen, is violated. Thus, under a constitution declaring "that no freeman shall be put to answer any criminal charge, but by indictment," etc., and "that no freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men in open court, as heretofore used," an act of the legislature which gives to an officer of an incorporated town the power of trying assaults and batteries, or other crimes, is, in the opinion of the Supreme Court of North Carolina, void, because it violates both of these provisions of the constitution.'

§ 363. A similar view was taken in the state of Arkansas, the constitution of which provided that "no man shall be put to answer any criminal charge but by presentment, indictment, or impeachment;" and it was held that the legislature could not confer upon the corporation courts of a city the power to punish an assault and battery—this being a criminal charge—without presentment or indictment; and it was consequently decided that the judgment of conviction of such a court for an assault and battery is *coram non judice*, and constitutes no bar to a prosecution by indictment in the courts of the state for the same offence.'

for the trial in a summary way, before municipal courts, of petty or police offences. *Ante*, Chap. IV. *Supra*, secs. 300–302, 344, 345.

¹ *State v. Moss*, 2 Jones (N. C.) Law, 66, 1854. See *Tierney v. Dodge*, 9 Minn. 166, 1864. The constitution of Louisiana (art. 103) requires that "prosecutions shall be by indictment or information. The accused shall have a speedy trial by an impartial jury of the vicinage." Another article (124) provides that "the mayors, recorders, &c., may be commissioned, and the legislature may vest in them such criminal jurisdiction as may be necessary for the punishment of minor crimes and offences, as the police and good order of the city of New Orleans may require." It was held that article 103 laid down the general rule, to which article 124 was an exception, and that under the latter article it was competent for the legislature to provide for the prosecution of minor offences, without indictment or jury trial, in the Recorder's Court." *State v. Gutierrez*, 15 La. An. 190, 1860.

² *Rector v. State*, 6 Ark. (1 Eng.) 187, 1845; *Durr v. Howard*, 6 Ark. 461;

§ 364. The same doctrine was declared in Michigan. The constitution of that state contained a provision that "no person shall be held to answer for a *criminal offence* unless on the presentment of a grand jury, except cases cognizable by justices of the peace," &c.; and, by the statutes of the state, the keeping of a bawdy house was declared to be an offence punishable by fine and imprisonment. Under this state of the law the city of Detroit was empowered by the legislature "to make all such by-laws and ordinances as may be deemed expedient by the common council for effectually preventing and suppressing houses of ill-fame within the limits of the city." It was held that the term "criminal offence" in the constitution included both felonies and misdemeanors, and embraced the offence (which was such both at common law and by the statute of the state) of keeping a house of ill-fame, and therefore an ordinance of the common council prescribing the punishment for keeping such a house within the city and providing for the trial and conviction of the offenders in the municipal court without *indictment*, was unconstitutional, the judgment of the court resting upon the principle that under the constitutional provision quoted, there could be no summary conviction under an ordinance for *that* which is a criminal offence by the general laws of the state.¹

§ 365. So, by the constitution of Texas, it is provided that, "in all cases in which justices of the peace or inferior

Lewis v. State, 21 Ark. 211. But it is held in the same state that a corporation court may punish a person for using obscene language in the streets, because such an offence is not declared criminal by any statute of the state. Slattery, *Ex parte*, 8 Ark. 484,

¹ People v. Slaughter, 2 Doug. (Mich.) 334, 1842, note; and see Welch v. People, *Ib.* 332, 1846. But in Kentucky, the constitution of which provides that "no person shall, for any indictable offence, be proceeded against criminally by information," and that "all prosecutions shall be carried on in the name and by the authority of the commonwealth," the legislature may authorize a city corporation to proceed in its name against offenders for violating its ordinances, and punish them by fine, although the offence, as in the case before the court (an assault and battery), is indictable under the laws of the state. The court regarded the proceeding in the name of the corporation as of a *quasi* civil or penal nature, and not as criminal. Williamson v. Commonwealth, 4 B. Mon. 146, 1843.

tribunals shall have jurisdiction of causes where the penalty is fine and imprisonment (except in cases of contempt), the accused shall have the right of trial by jury," and under this it was held that the mayor's court could not constitutionally be invested with power to try summarily, and without a jury, a person for assault and battery, in violation of the ordinances of the corporation, where the mayor was authorized to impose a fine.¹

§ 366. In *Zylstra v. The Corporation of Charleston*, it appeared that the organic act of the city gave to the common council power to affix and levy fines for all offences against their by-laws, and there was no limitation of the *amount* of the fines. In this respect the charter was silent. The "Court of Wardens" (the corporation tribunal) had the power expressly given to it to commit for fines and penalties. Under these circumstances the corporation of Charleston passed an ordinance prohibiting the exercise of the trade of candle and soap making within the limits of the city, under a penalty of £100. Zylstra was prosecuted in the Court of Wardens—composed of members of the city council—for a violation of this by-law, and fined by this court £100. On his motion to obtain a *prohibition* it was held, under the constitution of that state, that the proceedings of the Court of Wardens were void, not being according to the *lex terræ* recognized by Magna Charta, and expressly adopted by the state constitution. And the judges who expressed themselves on that point were of opinion, under the state constitution, that that tribunal could not be invested with a jurisdiction greater than that exercised by justices of the peace, unless there was provision for securing a trial by jury, which in the instance before the court had not been made.²

¹ *Burns v. La Grange*, 17 Texas, 415, 1856; *S. P. Smith v. San Antonio*, *Ib.* 643.

² *Zylstra v. Charleston*, 1 Bay, 382, 1794.

In holding that the charter of the city of Lancaster did not confer upon the councils the right to vest in the mayor and aldermen jurisdiction to convict summarily, and imprison in default of payment of the penalty affixed to an ordinance, *Gibson*, C. J., remarked: "Now, if the charter even purported to confer a power to imprison on summary conviction [for a mis-

Sufficient of the Right of a Jury Trial is Given by Appeal.

§ 367. It is, however, the prevailing doctrine, that although the charge or matter in the municipal or local courts be one, in respect of which the party is entitled to a trial by jury, yet if by an appeal, clogged with no unreasonable restrictions, he can have such a trial as a matter of right in the appellate court, this is sufficient, and his constitutional right to a jury trial is not invaded by the summary proceeding in the first instance.¹

demeanor] and without appeal to a jury, it would be so far unconstitutional and void." *Barter v. Commonwealth*, 3 Pa. (Pen. & W.) 253, 1831.

A statute providing for *summary* conviction for a new offence before inferior jurisdictions, without a jury, does not violate the provision of the constitution that "trial by jury shall be *as heretofore*, and the right thereof remain inviolate." *Van Swartow v. Commonwealth*, 24 Pa. St. 131, 1854. See, also, *Boring v. Williams*, 17 Ala. 510; *Tines v. The State*, 26 Ala. 165; *In re Powers*, 25 Vt. 261; *Murphy v. People*, 2 Cow. 815; *Shirley v. Lunenburg*, 11 Mass. 379; *Rhines v. Clark*, 51 Pa. St. 96. *Supra*, sec. 361.

As to the right, under particular constitutional and statutory provisions, to a *jury trial*, for violations of municipal by-laws: *Thomas v. Ashland*, 12 Ohio St. 124; *Work v. State*, 2 *Ib.* 296; *Gray v. State*, 2 Harring. (Del.) 76, 1836; *Low v. Commissioners of Pilotage*, R. M. Charl. (Geo.) 302; *Green v. Mayor*, *Ib.* 368, 371; *Williams v. Augusta*, 4 Geo. 509; approved, *Floyd v. Commissioners*, 14 Geo. 354, 1853; *State v. Guttierrez*, 15 La. An. 190; *Trigally v. Memphis*, 6 Coldw. (Tenn.) 882, 1869.

Jurisdiction of mayor's, recorder's, and police courts under statutes or special charters. *Commonwealth v. Pindar*, 11 Met. 539; *Commonwealth v. Roark*, 8 Cush. 210; *Same v. Emery*, 11 Cush. 406; *Elder v. Dwight Manufacturing Company*, 4 Gray, 201; *State v. Ricker*, 32 N. H. 179; *Myers v. People*, 26 Ill. 173; *Rice v. State*, 3 Kansas, 141; *State v. Young*, 3 Kansas, 445; *Malone v. Murphy*, 2 Kansas, 250; *Gray v. State*, 2 Harring. (Del.) 76; *Hutchins v. Scott*, 4 Halst. (N. J.) 218; *Cincinnati v. Gwynne*, 10 Ohio, 192; 14 *Ib.* 250, 603; *Markle v. Akron*, 14 Ohio, 586; *Weeks v. Foreman*, 1 Harris. (N. J.) 237; *Truchelut v. City Council*, 1 Nott & McC. 227; *Thornton v. Smith*, 1 Washing. (Va.) R. 106; *McMullen v. City Council*, 1 Bay (South Car.) 46; *Zylstra v. Charleston*, *Ib.* 382; *Willis v. Booneville*, 28 Mo. 543; *Fayette v. Shafroth*, 25 Mo. 445; *Sill v. Corning*, 15 N. Y. 297; *Goodrich v. Brown*, 30 Iowa, 291, 1870. *In re Penna. Hall*, 5 Pa. St. 204, 1847.

Extent of jurisdiction territorially. *State v. Clegg*, 27 Conn. 593; *Covill v. Phy* (process) 26 Ill. 432; *State v. McArthur*, 13 Wis. 383.

¹ *Stewart v. Mayor*, 7 Md. 501; *Morford v. Barnes*, 8 Yerger (Tenn.) 444; *McDonald v. Schell*, 6 Serg. & Rawle, 240; *Beers v. Beers*, 4 Conn.

Review of Proceedings by Superior Tribunals.

§ 368. With respect to inferior jurisdictions, the right to review their proceedings by the superior tribunals will not be taken away unless the intention of the legislature to this effect is expressed with unequivocal clearness. The authorities cited in the note will show the great length to which the courts go in preserving the right to review the proceedings of subordinate tribunals, administered frequently by men without professional or judicial knowledge or experience. A declaration by the statute concerning an inferior tribunal, that its proceedings “shall be *final* and *conclusive*,” or “*without appeal*,” etc., will not deprive a party of the right of review by *certiorari*, error, or the proper proceeding.¹ But where it is declared with respect to a

535; *Jones v. Robbins*, 8 Gray, 329; *Dorgan v. Boston*, 12 Allen, 228; *Sedg. St. and Const. Law*, 549; *Cooley Const. Lim.* 410. *Infra*, sec. 651.

¹ *Rex v. Commissioners*, 2 Keeble, 48; *Rex v. Morley*, 2 Burr. 1040; *Lawton v. Commissioners*, 2 Caines (N. Y.) 179, 181; *Starr v. Trustees*, 6 Wend. 564; *People v. Mayor*, 2 Hill (N. Y.) 9; *Tierney v. Dodge*, 9 Minn. 166; *Ex parte Heath*, 3 Hill (N. Y.) 42, 52, and cases cited and reviewed by *Cowen, J.*

A kindred subject is treated in the chapter on Municipal Officers—“Special Tribunal to Determine Election Contests for Municipal Offices,” *ante*, sec. 139, and it is there shown that the ordinary constitutional provision that the judicial power shall be vested in certain courts does not disable the legislature from providing that the council of municipal corporations may finally determine the validity of the election of corporation officers. *Mayor, &c. v. Morgan*, 7 Martin (La.) 1; 9 *Ib.* (N. S.) 381, 1828; *State v. Fitzgerald*, 44 Mo. 425, 1869; *Ewing v. Filley*, 43 Pa. St. 384; *State v. Johnson*, 17 Ark. 407. But the supervisory jurisdiction of the superior courts will not be held to be taken away by mere negative words. *Grier v. Shackelford*, *Const. Rep.* 642; *State v. Fitzgerald*, *supra*; *Commonwealth v. McCloskey*, 2 Rawle, 369; *Ex parte Strahl*, 16 Iowa, 369; *State v. Funck*, 17 Iowa, 365; *Bateman v. Megowan*, 1 Met. (Ky.) 533; *Wammacks v. Holloway*, 2 Ala. 31; *Hummer v. Hummer*, 3 G. Greene, 42; *State v. Marlow*, 15 Ohio St. 114; *Attorney General v. Corporation of Poole*, 4 Mylne & Cr. 17; *Attorney General v. Aspinwall*, *Ib.* 613; *Parr v. Attorney General*, 8 Cl. & F. 409; *Taylor v. Americus*, 39 Geo. 59. *Post*, chaps. XX. XXI. XXII. *Post*, sec. 740.

The Supreme Court of Michigan, in reviewing, on *certiorari*, the legality of a conviction of a defendant in the recorder's court on a complaint for violating a municipal ordinance, speaking of the extent of the *revisory*

court of general and superior jurisdiction, as of the Supreme Court of New York, that its action (for example, in confirming appraisements for opening streets, or under a railroad act) “shall *be final and conclusive* upon the parties interested and upon all other persons,” the right of appeal, which would otherwise exist from the decision of such court to a still higher tribunal, as to the Court of Appeals, is destroyed.¹ A charter provision to the effect that appeals and writs of error from judgments of the mayor, in cases arising under the charter, should only be allowed in cases where the fine was over five dollars, was considered as evincing the legislative intention that in cases where the fine was under that sum the judgment should be final, and

power of the superior tribunals, and the nature and purposes of the municipal tribunals, says: “The power of reviewing upon *certiorari* judicial proceedings of inferior tribunals and bodies not according to the course of the common law, has been long exercised in England, as well as in this country. The power has been jealously maintained, and has been deemed necessary to prevent oppression. There are certain classes of questions which, by common understanding from time immemorial, belong to the course of the judicial inquiry under the laws of the land. The common law, and the various charters and bills of rights, recognized and assured the right to such an inquiry. And the constitution, in apportioning the judicial power, as well as in affirming the immunity of life, liberty, and property, has always been understood to guarantee to each citizen the right to have his title to property, and other legal privileges, determined by the general tribunals of the state. These municipal courts, so far as they act under city by-laws, are not designed to decide between man and man, or to administer general laws. They are ordained to prevent disorder in matters of local convenience, and to regulate the use of public and *quasi* public easements, so as to prevent confusion. If in exercising this power they can incidentally decide upon the rights of private property so as to determine its enjoyment without review, there would seem to be a practical annihilation of the right to resort to the general tribunals and the common law.” *Per Campbell, J., Jackson v. People*, 9 Mich. 111, 117, 1860. Further, see chap. XXII. *post*.

An *appeal* from inferior tribunals does not exist unless plainly given. *People v. Police Justice*, 7 Mich. 456; *Conboy v. Iowa City*, 2 Iowa, 90; *Muscatine v. Steck*, 7 Iowa, 505; *Dubuque v. Rebman*, 1 Iowa, 444. *Certiorari*, on the other hand, will lie unless plainly denied, or other specific remedy be given. *Cunningham v. Squires*, 2 West Va. 422, 1865. *Post*, sec. 476, and chapter on Remedies Against Illegal Corporate Acts, *post*.

¹ *Matter of Canal and Walker streets*, 12 N. Y. (2 Kern.) 406, 1855; *New York, &c. Railroad Company v. Marvin*, 11 *Id.* (1 Kern.) 276.

hence a writ of prohibition will not lie to restrain its collection, nor can it be reviewed on *certiorari*.¹

§ 369. In Virginia it is decided that in a proceeding before the mayor or a justice to impose a penalty on a party for obstructing a street, the mayor or justice cannot, if the defendant *bona fide* sets up title to the land claimed as a street, inquire into the validity of the claim, the court holding that by the principles of the common law (which are not changed by the statutes), a *bona fide* assertion of title to property or to an incorporeal hereditament, or real franchise, ousted the jurisdiction of these inferior magistrates or tribunals.²

¹ Wertheimer v. Mayor, &c., 29 Mo. 254, 1860.

² Warwick v. Mayo, 15 Gratt. (Va.) 528, 1860. To the same effect, see Jackson v. People, 9 Mich. 111, 1860; Grand Rapids v. Hughes, 15 Mich. 54, 1866. See chapter on Streets. What record of conviction before corporation officers or courts should show. Keeler v. Milledge, 4 Zab. (N. J.) 142; Muscatine v. Steck, 7 Iowa, 503. See chap. XXII. *post*.

CHAPTER XIV.

CONTRACTS.

§ 370. The mode of enforcing the contracts of municipal corporations will be considered hereafter.¹ In this chapter we will treat, in the order below indicated, of the power of such corporations to make contracts of different kinds, the mode of exercising the power, and the effect of transcending it:

1. Extent of Power to Contract, and How Conferred—secs. 371, 372.

2. Mode of Exercising the Power—sec. 373.

3. Seal Not Necessary Unless Required—May be Concluded by Vote or Ordinance—secs. 374, 375.

4. When Bound by Contracts Made by Agents—Mode of Execution—secs. 376–380.

5. Contracts Beyond Corporate Powers Void—*Ultra Vires* a defence—secs. 381, 382.

6. Implied Contracts—When Deducible—secs. 383, 384.

7. Ratification of Unauthorized Contract—secs. 385–387.

8. Provision Requiring Letting to Lowest Bidder—secs. 388–392.

9. Contract of Suretyship—secs. 393.

10. Rights and Liabilities as Respects Authorized Contracts—Illustrations—Cases Mentioned. Power to Settle Disputed Claims—to Give Extra Compensation—to Employ Attorneys—secs. 394–399.

11. Contracts for Public Works—Rights of Contractors—secs. 400–403.

12. Same—Corporate Control Under Stipulation—secs. 400–403.

13. Evidences of Indebtedness—Negotiable Bonds—secs. 404, 405.

¹ See *post*, chaps. XX. XXII. XXIII. Legislative power over contracts made by municipal corporations. See chap. IV. *ante*.

14. Ordinary Warrants or Orders—Their Legal Nature—secs. 406, 407.

14. Liability of Indorsers Thereof—sec. 408.

16. Payment and Cancellation of Orders and Warrants—sec. 409.

17. Rights and Remedies of Holders Thereof—secs. 410, 411.

18. Defences Thereto—*Ultra Vires*—Fraud—Want of Consideration—sec. 412.

19. Orders Payable out of a Particular Fund—sec. 413.

20. Interest on Corporate Indebtedness—sec. 414.

21. Railroad Aid Bonds—Course of Decision in U. S. Supreme Court—secs. 415, 416.

22. Leading Cases in National Supreme Court on the Subject Noticed—secs. 417, 422.

23. Decisions in State Courts Referred to—Conclusion Stated—secs. 423–426.

§ 371. *Extent of Power, and How Conferred.*—In determining *the extent of the power* of a municipal corporation to make contracts, and in ascertaining *the mode* in which the power is to be exercised, the importance of a careful study of the charter or incorporating act, and the general legislation of the state on the subject, if there be any, cannot be too strongly emphasized. Where there are express provisions on the subject, these will, of course, measure, as far as they extend, the authority of the corporation. The power to make contracts, and sue and be sued thereon, is usually conferred, in general terms, in the incorporating act. But where the power is conferred in this manner it is not to be construed as authorizing the making of contracts of all descriptions, but only such as are necessary and usual, fit and proper, to enable the corporation to secure or carry into effect the purposes for which it was created; and the extent of the power will depend upon the other provisions of the charter defining the matters in respect of which the corporation is authorized to act. To the extent necessary to execute the special powers and functions with which it is endowed by its charter, there is, in.

deed, an *implied or incidental authority* to contract obligations and sue and be sued in the corporate name.¹

¹ 1 Kyd, 69, 70; 2 Kent Com. 224; Angell & Ames, secs. 110, 271; Galena v. Commonwealth, 48 Ill. 423, 1868; Straus v. Insurance Company, 5 Ohio St. 59, 1855; Chaffee v. Granger, 6 Mich. 51; Douglas v. Virginia City, 5 Nev. 147, 1869; Goodrich v. Detroit, 12 Mich. 279; Bank of Columbia v. Patterson, 7 Cranch, 299, 1813; Siebrecht v. New Orleans, 12 La. An. 496, 1857; Bateman v. Mayor, &c., 8 Hurl. & Nor. 322, 1858.

Under general authority to make all contracts necessary for its welfare, a city may contract for *water works*. Rome v. Cabot, 28 Geo. 50; see Wells v. Atlanta, 43 Geo. 67. Duty and power as owner of water works. McKnight v. New Orleans, 24 La. An. 412, 1872. Grant v. Davenport, Iowa Sup. Ct. 1873; Hall v. Houghton, 8 Mich. 458. For *grading streets*. Sturtevant v. Alton, 3 McLean, 393. For "*breakwater*" to protect streets of a city on the lake. Miller v. Milwaukee, 14 Wis. 642; approved, *arguendo*, by Cole, J., in Clason v. Milwaukee, 30 Wis. 316, 321, 1872. *Supra*, sec. 261, note. *Legislative power over municipal contracts*. *Ante*, chap. IV. Grant v. Davenport, Iowa Sup. Ct., 1873.

The city of Richmond possessed, under its charter, all the powers of municipal corporations, including the power "to contract and be contracted with," and its council was specially empowered to "pass all by-laws which they shall deem necessary for the peace, comfort, convenience, good order, good morals, health, or safety of the city, or of the people or property therein." In April, 1865, in anticipation of the evacuation of the city by the confederate army and the entry of the national forces, the *city council ordered the destruction of all the liquor in the city*, and pledged the faith of the city for the payment of its value, and it was decided by the Court of Appeals that under the provision of the charter above mentioned the council had authority to make the order and pledge, and hence the city was responsible for the value of liquor destroyed under the order of the council. Jones v. Richmond, 18 Gratt. (Va.) 517, 1868. The same question upon the same resolutions of the city council was presented to the United States Supreme Court in Richmond v. Smith, 15 Wall. 429, 1872; and it followed, without examination into its correctness, the exposition of the charter given by the State Court in Jones v. Richmond, *supra*. Upon the general principles of construction, the author doubts whether the order for the destruction of the liquors was within the scope of the corporate powers of the city. *Ante*, sec. 55. Contract made by city under government therein set up by the United States military authority held valid. Prather v. New Orleans, 24 La. An. 41. In the absence of a provision in the statute or ordinances to the contrary, a municipal corporation may lawfully enter into a contract with an officer of the corporation. Albright v. Town Council, 9 Rich. (South Car.) Law, 399. In this case, a contract entered into between the town council and intendant of a town, whereby the latter agreed to keep the streets in repair, was held valid. See, also, Railroad Company v. Claghorn, Speers Eq. 562. Compare, City of Toronto v. Bowes, 4 Grant (Canada) 504, as to contracts with members of the council. *Ante*, sec. 221, note, sec. 230.

§ 372. Thus, if the corporation is authorized to erect markets, it may contract to buy, or may receive a grant of land, on which to place market buildings, and it may make contracts for the erection of market houses. As it is the general practice in granting municipal charters and in general acts for the incorporation of towns and cities, to enumerate their powers and define their duties, it will suffice in this place to remark generally that the *authority* to enter into contracts necessary and proper to carry into effect their powers and discharge their duties *is impliedly given* to every such corporation. But this implied authority is only co-extensive with the powers and duties of the corporation; and if any greater authority is claimed it must be sought for in an express or special grant from the legislature. It is scarcely necessary to observe that no contract can be made by a corporation which is *prohibited* by its charter or by the statute law of the state.¹ And it is a general and fundamental principle of law, that *all* persons contracting with a municipal corporation must, *at their peril, inquire into the power* of the corporation or its officers to make the contract; and a contract beyond the scope of the corporate power is void, although it be under the seal of the corporation.² So, also, those *dealing with the agent* of a municipal

¹ Jackson v. Bowman, 39 Miss. 671, 1861. Contracts to violate the charter, or to bargain away or restrict the free exercise of legislative discretion, vested in a municipality or its officers in reference to public trusts, are void. *Ib.* Thomas v. Richmond, 12 Wall. 349, 1870, in which notes issued by the city to circulate as money in contravention of law were adjudged void, and the city held not to be liable either in special or general assumpsit. *Ante*, sec. 61, and cases there cited.

² Marsh v. Fulton County, 10 Wall. 676, 1870; *Ante*, sec. 55; *Infra*, sec. 380; Leavenworth v. Rankin, 2 Kansas, 357, 1864; Horn v. Baltimore, 80 Md. 219, 1868; Bridgeport v. Railroad Company, 15 Conn. 475, 493, 1843; Haynes v. Covington, 13 Sm. & Mar. 408, 1850; Taft v. Pittsford, 28 Vt. (2 Wms.) 286, 1856; City Council v. Plank Road Company, 31 Ala. 76, 1857; Steam Navigation Company v. Dandridge, 8 Gill & J. 248, 319; Hodges v. Buffalo, 2 Denio, 110; Baltimore v. Eschbach, 18 Md. 276, 282, 1861; Baltimore v. Reynolds, 20 Md. 1; Dill v. Inhabitants, &c., 7 Met. 438, 1844; Branham v. San Jose, 24 Cal. 585, 602; Sturtevant v. Alton, 3 McLean, 393, 1844; Wallace v. San Jose, 29 Cal. 180; State v. Kirkley, 29 Md. 85, 111, 1868; Bateman v. Mayor, &c., 3 Hurl. & Nor. 323; State v. Haskell, 20 Iowa, 276. Within the scope of its power a corporation may contract to do an act *at any place* other than the one where it is located. Bank of Utica

corporation are likewise bound to ascertain the nature and extent of his authority. This is certainly so in all cases where this authority is special and of record, or conferred by statute. The fact in such a case that the agent made false representations in relation to his authority and what he had already done, will not aid those who trusted to such representations to establish a liability on the part of his corporate principal.¹

v. Smedes, 8 Cow. 662; *Maddox v. Graham*, 2 Met. (Ky.) 56. Or *prospective* in its terms. *Davenport v. Hallowell*, 10 Maine, 317. As to *corporate seal*. *Ante*, sec. 130. Where a public corporation, transcending its legal power, assumes to direct its officers—for example, commissioners of highways—to bring an action in their own names, or in their name of office, against third persons for trespasses upon the highways, and the action is accordingly brought and the officers are defeated, they cannot sustain an action against the corporation to be reimbursed their costs and expenses; and the reason is, that the action of a corporation directing *such a suit* to be brought, being in excess of its lawful power, is void, and cannot be the foundation of any contract, express or implied. *Cornell v. Guilford*,¹ Denio, 510. *Ante*, sec. 98.

¹ *Baltimore v. Eschbach*, 18 Md. 276, 282; *Baltimore v. Reynolds*, 20 Md. 1, 1862; *Delafield v. State of Illinois*, 2 Hill (N. Y.) 159, 174; 26 Wend. 192, 1841; affirming S. C., 8 Paige, 531, restraining unauthorized sale of bonds. *Hodges v. Buffalo*, 2 Denio, 110; 3 Comst. 430; 2 Barb. 104; *Supervisors, &c. v. Bates*, 17 N. Y. 242, 1858. This case also determines how far, in such a case, the sureties of such an agent or officer are liable for his acts. And see cases cited *Ib.* p. 245. *Chemung Canal Bank v. Supervisors*, 5 Denio, 517, 1848; *Overseers, &c. v. Same*, 15 N. Y. 341; 2 Comst. 178, *per Strong, J.*; *Marsh v. Fulton Co.*, 10 Wall. 676, 1870; *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543, 1869; *Swift v. Williamsburg*, 24 Barb. 427; *Hague v. Philadelphia*, 48 Pa. St. 527; *State v. Kirkley*, 29 Md. 85, 111; *Horn v. Baltimore*, 30 Md. 218, 1868; *Thomas v. Richmond*, 12 Wall. 349, 1870, *per Bradley, J.*

Special and limited authority to *borrow money* conferred upon the town treasurer, when exercised, is exhausted, and the town is not liable for money he subsequently borrows and converts to his own use, although he assumed to act, and was, by the lender, supposed to be acting under the authority conferred upon him. *Savings Bank v. Winchester*, 8 Allen, 109, 1864; *ante*, sec. 81.

So in Upper Canada it is held that an individual dealing with a corporation through its council or the members of the governing body, is bound to notice the objects and limits of their powers and the manner in which those powers are to be exercised, and it should be borne in mind that their acts, when beyond the scope of their authority or done in a manner unauthorized, are in general nugatory and not binding on the corporation. *Ramsay et al. v. The Western District Council*, 4 U. C. Q. B. 374; *Harr. Manual*, 2nd ed. p. 20.

§ 373. *Mode of Exercising the Power.*—Respecting the *mode* in which contracts by corporations should be made, it is important to observe, that when, as is sometimes the case, the mode of contracting is specially and plainly prescribed and limited, that mode is exclusive, and must be pursued, or the contract will not bind the corporation ;¹ but the courts have sometimes regarded provisions on this subject as directory. Thus, where the charter directed the mode in which moneys should be drawn from the treasury to be by an *order* of the council, signed by the mayor, such an order, issued upon a memorandum in the minutes of the corporation, without a formal order being entered, was adjudged a sufficient 'compliance with the charter.' But unless the mode be prescribed and limited, valid contracts within the scope of the corporate powers may be made, as we shall see, otherwise than under seal or in writing.

§ 374. *Seal not Necessary—How Concluded.*—Modern decisions have established the law to be, that the contracts

¹ *Head v. Insurance Company*, 2 Cranch (U. S.) 127, 1804; *White v. New Orleans*, 15 La. An. 667; *Infra*, sec. 388; *Dey v. Jersey City*, 19 N. J. Eq. 412, 1869; *Baltimore v. Reynolds*, 20 Md. 1. Speaking of this subject in the case first cited, *Marshall, C. J.*, says: "The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and *when it prescribes to them a mode of contracting*, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated." Approved, *Bank of United States v. Dandridge*, 12 Wheat. 64, 68, 1827; see also *Angell & Ames Corp. sec. 253*; *Diggle v. Railway Company*, 5 Exch. 442; *Homersham v. Wol. &c. Company*, 4 Eng. Law & Eq. 426; *Frend v. Dennett*, 4 C. B. (N. S.) 576; *Butler v. Charlestown*, 7 Gray (Mass.) 12; *Trustees v. Cherry*, 8 Ohio St. 564, 1858; *Bladen v. Philadelphia*, 60 Pa. St. 464; *McCracken v. San Francisco*, 16 Cal. 591; *Piemental v. San Francisco*, 21 Cal. 351; *Zottman v. San Francisco*, 20 Cal. 90; *Argenti v. San Francisco*, 16 Cal. 255, 282, opinion of *Field, C. J.* *Post*, chapter on Taxation and Local Assessments. If a corporation sue upon a contract, though it be executory on their part, and not executed, this amounts to a conclusive admission that the contract was duly entered into by them. *Grant on Corp.* 63; 5 *Man. & Granger*, 192. A contract by a city with street railway company held not concluded, something remaining to be done. *People's R. R. v. Memphis R. R.*, 10 Wall. 38.

² *Kelly v. Mayor, &c. of Brooklyn*, 4 Hill (N. Y.) 263, 1843; see *Neiffer v. Bank*, 1 Head (Tenn.) 162; *Penrose v. Taniere*, 12 Queen's B. 1011; *Mad-dox v. Graham*, 2 Met. (Ky.) 56.

of municipal corporations need not be under *seal* unless the charter so requires. The authorized body of a municipal corporation may bind it by an *ordinance*, which, in favor of private persons interested therein, may, if so intended, operate as a contract; or they may bind it by a *resolution*, or by *vote* clothe its officers, agents, or committees, with power to act for it; and a contract made by persons thus appointed by the corporation, though by parol (unless it be one which the law requires to be in writing) will bind it.¹

¹ *Fanning v. Gregoire*, 16 How. (U. S.) 524, 1853; *Ante*, sec. 132; *Abbey v. Billups*, 85 Miss. 618; *Alton v. Mulledy*, 21 Ill. 76, 1859; *Western, &c. Society v. Philadelphia*, 81 Pa. St. 175; *Ib.* 185; *Clark v. Washington*, 12 Wheat. 40, 1827; *Hamilton v. Railroad Company*, 9 Ind. 359, 1857; *Ross v. Madison*, 1 Ind. (Cart.) 281, 1848; *Story Agency*, sec. 52, where it is said that, "as the appointment of an agent of a corporation may not always be evidenced by written vote, it is now the settled doctrine—at least in America—that it may be inferred and implied from the adoption or recognition of the acts of the agent by the corporation." *Infra*, sec. 383. *Parol contract* by council with city physician held valid, no provision of the charter being contravened. *Selma v. Mullen*, 46 Ala. 411, 1871. See, also, *Brook Com. on Com. Law*, 561-570.

In *Fleckner v. United States Bank*, 8 Wheat. (U. S.) 338, 357, 1823, it was urged that a corporation could not authorize any act to be done by an agent by a mere vote of the directors, but only by an appointment under its corporate seal. But the court declared that such a doctrine, whatever may have been its original correctness as applied to common law corporations, had "no application to modern corporations created by statute, whose charters contemplate the business of the corporation to be transacted by a special body or board of directors. And the acts of such a body or board, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the utmost solemn acts done under the corporate seal." *Per Story*, J. Further, as to common seal, see *ante*, sec. 130. Authority of agent, in absence of special restriction, may be given by parol or inferred from acts. *Detroit v. Jackson*, 1 Doug. (Mich.) 106. See *ante*, sec. 130. *Infra*, sec. 383.

A provision in the organic act of a city, that "on the passage of every by-law or order to enter into a contract by the council, the ayes and nays shall be called and recorded," prescribes how the *order to contract* shall be made and evidenced when directed by the council, but it is not a limitation on the power of authorized agents to make a contract *by parol*. *Indianola v. Jones*, 29 Iowa, 282, 1870. *Ante*, sec. 229; *Baker v. Johnson Co.* (parol contract), 33 Iowa, 151.

Contract may be *concluded by ordinance* or action of the council (accepting proposals), without signature by parties. *People v. San Francisco*, 27 Cal. 655, 1865; *Sacramento v. Kirk*, 7 Cal. 419; *Logansport v. Blakemore*,

§ 375. The *assent* of a municipal corporation to the *variation or modification of a contract* need not necessarily be expressed by the formal action or resolution of the common council; but it may be *implied from acts* relating to the contract work subsequent to the date of the contract.¹

§ 376. *Contracts made by Agents—Mode of Execution.*—Where officers or agents of a corporation, duly appointed, and acting within the scope of their authority in executing an instrument in behalf of the corporation, sign their own names and affix their own seals, such seals are simply nugatory, and the instrument, according to the weight of modern judicial opinion, is to be regarded as the *simple contract of the corporation*, and will bind the corporation and not the individuals executing it, where the purpose to act for the corporation is manifest from the whole paper, and where there are no words evincing an intention to assume a personal liability.²

17 Ind. 318. How shown. *San Antonio v. Lewis*, 9 Texas, 69. In *Indianapolis v. Skcen*, 17 Ind. 628, 1861, it was held that third persons dealing with an agent of the city appointed by the council “to negotiate its bonds at not less than” a specified rate, were not obliged to look to the records of the council for either his appointment or his instructions, since they were not necessarily of record there; but persons dealing with such an agent are, of course, bound to ascertain the fact of his appointment and the extent of his authority, but not his private instructions. Authority of agent to negotiate sales of bonds. *Cady v. Watertown*, 18 Wis. 322.

¹ *Messenger v. Buffalo*, 21 N. Y. 196, 1860. Where certain work is stipulated to be done under the direction of a street commissioner of a city, this officer has authority, without a vote of the council, to authorize *extra work* to be done, or materials to be furnished, where these are rendered necessary by the action of the city authorities subsequent to the making of the contract, and where, without such extra work or materials, it would be impossible to fulfill the requirements of the contract. *Ib.* Modification of contracts by unauthorized officers not binding upon the corporation. *Bonesteel v. Mayor, &c. of New York*, 22 N. Y. 162, 1860; *Hague v. Philadelphia*, 48 Pa. St. 527. As to changes in contracts *by parol*, see *Hasbrouck v. Milwaukee*, 21 Wis. 217, 1866; compare *Sacramento v. Kirk*, 7 Cal. 419. *Infra*, sec. 383. Acceptance by city of proposals to it; see *Springfield v. Harris*, 107 Mass. 532, 1871.

² *Regents, &c. v. Detroit, &c.*, 12 Mich. 138; *Sweetzer v. Mead*, 5 Mich. 107; *Bank of Metropolis v. Gottschalk*, 14 Pet. 19; *Story Agency*, secs. 154, 260, 276, 277; *Bank of Columbia v. Patterson*, 7 Cranch, 299, 307; *Hatch v. Barr*, 1 Ham. (Ohio) 390; *Baker v. Chambles*, 4 G. Greene (Iowa) 428; *Lyon*

377. A few cases will be referred to, *illustrating the rule* just stated. A contract in relation to the survey of a city, a subject exclusively appertaining to the corporation,

v. Adamson, 7 Iowa, 501; 1 Am. Lead. Cas. 602; *Mott v. Hicks*, 1 Cow. 513, 534; *Blanchard v. Blackstone*, 102 Mass. 343; *Stanton v. Camp* (contract signed individually, with addition of "committee"), 4 Barb. 274; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Hopkins v. Mehaffy*, 11 Serg. & Rawle, 126; *Angell & Ames*, secs. 293, 295; *Gale v. Kalamazoo*, 23 Mich. 344, 1871; *Burrill v. Boston*, 2 Clifford C. C. 590, 1867. Where a town clothes its agent, or its committee, with full power to make a contract, and it is accordingly made, it is valid and binding, notwithstanding there has been no formal *acceptance* by a vote, or even if it be afterwards rejected by the corporation. *Davenport v. Hallowell*, 10 Maine, 317; *Jenkins v. School District*, 39 Maine, 220, 1855; *Willard v. Newburyport*, 12 Pick. 227; *Kingsbury v. School District*, 12 Met. 99, 1846.

Where school directors gave an authorized bond for borrowed money, in their individual names, *as* school directors, though signed and sealed in their individual names, the corporation, and not the individuals, are liable thereon. *Heidelberg School Dist. v. Horst*, 62 Pa. St. 301, 1869.

The *power of a committee*, appointed by a vote of a town, "to let out and superintend the making" of a highway, is completely executed by the making of a contract with a third person embracing the whole subject matter of the vote and by the superintending of the construction of the highway. And, therefore, if the person contracted with fails to complete the road according to his contract, this is a matter for the *town* to deal with, and the committee have no power, without new authority from the town, to enter into a contract with another person for its completion. If they do so, and pay money in pursuance thereof, the town is not liable to them therefor. Nor is it liable if they transcend their power, and make a contract for a more expensive road than they were authorized to do. *Keyes v. Westford*, 17 Pick. 273, 1835.

Power to a *town committee* "to superintend the building of a house for the town," was adjudged to include the power to make the necessary contracts, it not appearing that any other or special committee or agent was appointed for that purpose—the court being of opinion that the making of contracts was essential to the building of the house. *Damon v. Granby*, 2 Pick. 345, 1824. *Ante*, chaps. IX. X. Majority of committee must sign contract. So held: *Curtis v. Portland*, 59 Maine, 483, 1871. *Ante*, sec. 221, and note.

It has been held in Upper Canada where work was done under a contract not made with the corporation or any of its known officers, but merely with persons assuming to act as a duly appointed committee, that no action would lie against the corporation. *Stoneburgh v. The Municipality of Brighton*, 5 U. C. Law J. 38. No action can be sustained for a breach of duty against the head of a corporation in not applying the seal to make a contract between a corporation and an individual, founded on a refusal (which if there had been a previous valid contract) would have

was entered into "between T. Van V., J. W., C. D. C., a committee appointed by the corporation of the city of Albany for that purpose, of the first part, and John R. Jr., of the second part." The parties of the first part agreed to pay for the work to be done, and signed their individual *names* and affixed their individual *seals* to the agreement. The authority of the committee to act for the corporation and to make the contract being conceded, it was ruled that they were not personally liable, and that it must be enforced by and against the corporation.¹ In another case, a contract for the repair of an engine house of a city was entered into by the inspector of the fire department in his own name, describing himself as "G. N. S., inspector, &c., of the first part," and signed in the same way. It was, in fact, made for and on account of the city, and it was held that the city was liable thereon, although its agent did not use its name in contracting, the court being of opinion, however, that the contract on its face showed it was made for the city.²

§ 378. So, where on a sale of real property by a corporation, a memorandum of the sale was signed by the parties, on which it was stated that the sale was made to A. B., the purchaser, and that he, C. D., "mayor of the corporation, in behalf of himself and the rest of the burgesses and commonalty of the borough of Caermarthen, do mutually agree to perform and fulfill, on each of their parts respectively, the conditions of the sale," and then came the signature of the purchaser, and of "C. D., Mayor," it was held that the

constituted a breach of it; in other words, there cannot be a remedy against the head of a corporation, equivalent to a remedy on the contract against the corporation, had the contract been duly made so as to create a valid and binding agreement. *Fair v. Moore*, 3 U. C. C. P. 484; *Harrison Municipal Manual for U. C.* p. 20.

¹ *Randall v. Van Vechten*, 19 Johns. 60, 1821; compare, however, *Fullam v. Brookfield*, 9 Allen, 1, 1864, where the court denies the doctrine of *Randall v. Van Vechten*; *Bank, &c. v. Patterson*, 7 Cranch, 299, and certain *dicta* in *Damon v. Granby*, 2 Pick. 345. But the text states the prevailing American rule. See also *Dubois v. Canal Company*, 4 Wend. 285; *Worrell v. Munn*, 1 Seld. 229; *Ford v. Williams*, 3 Kern. 577, 585; *Richardson v. Scott, &c. Co.*, 22 Cal. 150.

² *Robinson v. St. Louis*, 28 Mo. 488, 1859.

agreement was that of the corporation, and not that of the mayor personally ; and that, consequently, the mayor could not sue thereon.¹

§ 379. But the action or contract of the officers of a public corporation in their *individual capacity*, is not binding upon the corporate body.² For example: If the selectmen of a town in New England, as *individuals*, request a citizen to furnish supplies to a public enemy, to prevent violence to the town, this gives no legal right of recovery against the town ; and as the transaction was wholly beyond the official duty of selectmen, or the duty of the town as a corporation, it was doubted whether a regular vote to pay the plaintiff would have been legal, though it was admitted that a voluntary agreement among the *inhabitants* to this effect would have been binding, being founded on a meritorious consideration, as it was *their* property, and not that of the town, which was in danger.³

§ 380. While the agent of a public corporation, who by its vote or authority contracts for its use, cannot bind the

¹ Bowen v. Morris, 2 Taunt. 874, 887. The case of Burrill v. Boston, 2 Clifford C. R. R. 590, 1867, presents also, an instance in which it was considered that a contract signed by the mayor was one intended to be made on behalf of the corporation.

² Haliburton v. Frankford, 14 Mass. 214, 1817; Butler v. Charlestown, 7 Gray, 12, 1856.

³ Haliburton v. Frankford, *supra*; Stetson v. Kempton, 13 Mass. 272, 1816. Burrill v. Boston, 2 Clifford, C. C. R. 590, 1867. *Ante*, sec. 13. A majority of selectmen may, by statute, bind a town in New Hampshire by their written contract when acting within the limits of their authority. But a contract signed by one only of the selectmen in his own name, "for the selectmen," does not bind the town, nor will it be rendered valid by proof that another selectman authorized him so to sign the contract, or by proof that such was the practice in the town. If the *corporate name* had been affixed by one, such proof might have been sufficient. Andover v. Grafton, 7 N. H. 298, 305; Mason v. Bristol, 10 N. H. 36; Hanover v. Eaton, 8 N. H. 38. Powers of towns in New England. *Ante*, secs. 12, 13.

Contracts made by a *majority of the board of aldermen*, without any *official action* of the city council, are not binding upon the city; so decided where counsel were thus employed who rendered legal services beneficial to the corporation. Butler v. Charlestown, 7 Gray, 12, 1856; see, also, Sikes v. Hatfield, 13 Gray, 347, 1859. See chapter on Corporate Meetings, *ante*.

corporation by making a contract *by deed*: yet if such agent had authority to make the contract, it is binding upon the corporation as *evidence* of such contract. It follows that a contract of an agent or committee of a town, under his or their own seals, cannot be declared on, *in covenant or debt*, as the deed of the town. The *form* of the remedy against the town¹ is for damages, or in *assumpsit*. Although in *Damon v. Granby*² it was left an open question, whether a vote of a town having no corporate seal, expressly authorizing an agent to make a deed of land, or other contract, *under seal*, would, if executed according to the power, become technically the deed of the town, no substantial reason is perceived why such an instrument, thus executed, should not be treated as having all the attributes and qualities of a sealed instrument. If the corporation, however, has a common seal, which is the case with towns in many of the States, and with cities generally, and it is affixed to an instrument in pursuance of a vote of the corporation, or by the proper officer, such an instrument is, beyond doubt, technically the deed of the corporation.³

§ 381. *Contracts in Excess of Corporate Power—Ultra Vires as a Defence.*—The general principle of law is settled, beyond controversy, that the agents, officers, or even city council, of a municipal corporation, *cannot bind the corporation* by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, or which (not being in terms authorized) is against public policy. This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid grounds. The inhabitants are the corporators—the officers are but the public agents of the corporation. The duties and powers of the officers or public agents of the corpora-

¹ *Randall v. Van Vechten*, 19 Johns. 60, 65, 1821; *Damon v. Granby*, 2 Pick. 345, 1824; compare, *Fullam v. Brookfield*, 9 Allen, 1; *Bank of Columbia v. Patterson's Administrator*, 7 Cranch, 229, and rule as stated by *Story*, J., 306, 1813; *Clark v. Cuckfield Union*, 11 Eng. Law & Eq. 442; *Pennington v. Tanriere*, 12 Queen's B. 1011. *Ante*, sec. 132.

² *Damon v. Granby*, 2 Pick. 345, 352, 1824.

³ *Ib.* *Randall v. Van Vechten*, 19 Johns. 60, 65, 1821. But see *Fullam v. Brookfield*, 9 Allen, 1. *Corporate seal. Ante*, secs. 130–132.

tion, are prescribed by statute or charter, which all persons not only may know, but are bound to know. The opposite doctrine would be fraught with such danger, and accompanied with such abuse, that it would soon end in the ruin of municipalities or be legislatively overthrown. These considerations vindicate both the reasonableness and necessity of the rule that the corporation is bound only when its agents or officers, by whom it can alone act, if it acts at all, keep within the limits of the chartered authority of the corporation. The history of the workings of municipal bodies has demonstrated the salutary nature of this principle, and that it is the part of true wisdom to keep the corporate wings clipped down to the lawful standard.¹ It results from this doctrine that unauthorized contracts are void, and in actions thereon the corporation may successfully interpose the plea of *ultra vires*, setting up as a defence its own want of power under its charter or constituent statute to enter into the contract.² In favor of *bona fide* holders of

¹ This subject is touched upon in the concluding portion of chap. I. *ante*.

² *Post*, chap. XXIII. sec. 749; and see also the following cases: *Marsh v. Fulton County*, 10 Wall. 676, 1870; *Thomas v. Richmond*, 12 Wall. 349, 1870; *Bridgeport v. Housatonic Railroad Company*, 15 Conn. 475, 493, 1843; *Burrill v. Boston*, 2 Clifford C. C. 590, 1867; *Martin v. Mayor, &c.*, 1 Hill (N. Y.) 545, 1841; *Overseers, &c. v. Same*, 18 Johns. 382; *Donovan v. New York*, 33 N. Y. 291; *Siebrecht v. New Orleans*, 12 La. An. 496, 1857; *Clark v. Des Moines*, 19 Iowa, 199, 209, 1865; *Loker v. Brookline*, 13 Pick. 343, 348; *Philadelphia v. Flanigen*, 47 Pa. St. 21; *Trustees v. Cherry*, 8 Ohio St. 564; *Hague v. Philadelphia*, 48 Pa. St. 527; *Albany v. Cunliff*, 2 Comst. (N. Y.) 165, 1849, reversing S. C., 2 Barb. 190; *Cuyler v. Rochester*, 12 Wend. 165, 1834; *Hodges v. Buffalo*, 2 Denio, 110, 1846; *Halstead v. Mayor*, 3 Comst. 430, 1850; *Martin v. Mayor*, 1 Hill, 545; *Boone v. Utica*, 2 Barb. 104; *Cornell v. Guilford*, 1 Denio, 510; *Boyland v. Mayor, &c. of New York*, 1 Sandf. (N. Y.) 27, 1847; *Dill v. Wareham*, 7 Metc. 438, 1844; *Vincent v. Nantucket*, 12 Cush. 103, 105, 1858, *per Merrick, J.*; *Stetson v. Kempton*, 13 Mass. 272; *Parsons v. Inhabitants of Goshen*, 11 Pick. 396; *Wood v. Lynn*, 1 Allen (Mass.) 108, 1861; *Spalding v. Lowell*, 23 Pick. 71; *Mitchell v. Rockland*, 45 Maine, 496, 1858; S. C., 41 *Ib.* 363; *Anthony v. Cleveland*, 12 Ohio, 875, 1861; *Commissioners v. Cox*, 6 Ind. 403, 1855; *Inhabitants v. Weir*, 9 *Ib.* 224, 1857; *Smead v. Railroad Company*, 11 *Ib.* 104, 1858; *Brady v. Mayor*, 20 N. Y. (6 Smith) 312; *Appleby v. The Mayor, &c.*, 15 How. Pr. 428; *Estep v. Keokuk County*, 18 Iowa, 199, and cases cited by *Cole, J.*; *Clark v. Polk County*, 19 Iowa, 248, 1865. *Supra*, sec. 372; *post*, sec. 749; *Perry v. Superior City*, 23 Wis. 64, 1870.

Corporation may defend against unauthorized contract, although its

negotiable securities, the corporation may be estopped to avail itself of irregularities in the exercise of power conferred; but it may always show that under no circumstances could the corporation lawfully make a contract of the character in question. This subject has, however, been already referred to, and will be considered in a subsequent portion of the present chapter.¹

§ 382. Agreeably to the foregoing principles, a corporation cannot maintain an action on a bond or a contract which is *invalid*, as where a city, without authority, loaned its bonds to a private company, and took from it a penal bond, conditioned for the faithful application of the city bonds to works which the city had no power to construct or assist in constructing.² So a contract by a city to waive its

seal is attached to it. *Leavenworth v. Rankin*, 2 Kansas, 358, 1864; *ante*, sec. 132.

Mr. Justice *Coulter*, in delivering the opinion in *Allegheny City v. McClurkan*, 14 Pa. St. 81, expresses the opinion that a municipal corporation may be liable for the contracts *ultra vires* of its officers, when these are publicly entered into with the knowledge of the people, and not objected to until after the rights of third persons have attached. Such a principle is believed to be both unsafe and unsound; the only true and safe view being that all persons are bound to take notice of the powers and authority which the law confers upon the officers of such corporations. See *Loker v. Brookline*, 13 Pick. 343. Auditing and paying *part* of a claim presented, accompanied with a denial of liability for the residue, does not estop the debtor corporation from contesting the residue, even though it be upon grounds which show the former allowance to have been improper. *People v. Supervisors*, 1 Hill (N. Y.) 362, 1841. In an action on a contract for doing work which a municipal corporation had the power to make, it is no defence that the city ought to have adopted some less expensive means of accomplishing the purpose in view. *Livingston v. Pippin*, 31 Ala. 542, 1858.

The case of *The State v. Buffalo*, 2 Hill (N. Y.) 434, determines an interesting point. Arms belonging to the state were loaned to the city authorities to suppress disorderly assemblages. The keeper of the arsenal had no right to make the loan, but it was made in good faith, and the bond of the city taken for their return on demand. The city being sued on this bond, made the point that it was void for illegality, but the court regarded it rather as a *bona fide* excess of authority simply, and held that though the loan was unauthorized the state might waive the tort committed on the property and seek a remedy upon the bond.

¹ *Ante*, sec. 108; *infra*, secs. 415-426.

² *City Council v. Plank Road Company*, 31 Ala. 76, 1857. See *Mayor*

right to go on with the laying out of a street or not, as it might choose, is, it seems, against *public policy*, and it is void if it amounts to a surrender of its legislative discretion. So a promise to pay a public corporation, or their agents, a premium for doing their duty, is *illegal and void*; and a contract will not be sustained which tends to restrain or control the unbiased judgment of public officers. But a promise by individuals to pay a portion of the expenses of public improvements does not necessarily fall within this principle, and such a promise is not void as being against public policy; and if the promisors have a peculiar and local interest in the improvement, their promise is not void for want of consideration, and may be enforced against them.' So, on the other hand, a party making with a city a contract which is *ultra vires*, is *not estopped*, when sued thereon by the corporation for damages, to set up its want of authority to make it.'

&c. *v.* Winter, 29 *Ib.* 651; Halstead *v.* Mayor, &c., 3 Comst. 480; S. C., 5 Barb. 218; Bridgeport *v.* Housatonic Railroad Company, 15 Conn. 475, 493.

¹ Martin *v.* Mayor, &c., 1 Hill (N. Y.) 545, 1841; *ante*, sec. 61. As to *public policy*, see Ohio, &c. Company *v.* Merchants, &c. Company, 11 Humph. (Tenn.) 1; *ante*, chap. XII.

Corrupt agreements with aldermen, to influence them to a particular course in the discharge of official duties, are, of course, void, no matter to whom executed. Cook *v.* Shipman, 24 Ill. 614.

Contracts with *municipal officers*. *Ante*, secs. 221, n, 230, 371, n.

² Townsend *v.* Hoyle, 20 Conn. 1, 1849. This case holds that a promise by the defendants to pay the city the expense of laying a certain street was binding; and Ellsworth, J., in delivering the opinion, said: "We cannot assent to the proposition that a promise by individuals to pay a part of the expenses of public improvements, ordered by public authority, is, of course, illegal and void. The amount or cost may properly enough enter into the question of expediency or necessity. If made in one way or in one place, it will be much better for the public, though more expensive; but individuals specially benefited stand ready, by giving their land, their money, or their labor, to meet the extra expense. Will these promises be void, as being without consideration, or against public policy? We think not." See chapter on Streets, *post*; Springfield *v.* Harris, 107 Masa. 532.

³ City Council *v.* Plank Road Company, 31 Ala. 76, 1857; Steam Navigation Company *v.* Dandridge, 8 Gill & J. 248, 319, 320; Hodges *v.* Buffalo, 2 Denio, 110. If a corporation has received money in advance, on a contract void on account of want of authority to make it, and afterwards refuses to fulfill the contract, the party advancing the money may, without demand,

§ 383. *Implied Contracts*.—The present state of the authorities clearly justifies the opinion of Chancellor *Kent*, that corporations may be bound, by *implied contracts* within the scope of their powers, to be deduced by inference from authorized corporate acts, without either a vote, or deed, or writing.¹ This doctrine is applicable equally to public and private corporations, but in applying it, however, care must be taken not to violate other principles of law.² Thus it is obvious that an implied promise cannot be

recover it back in an action for money had and received. *Dill v. Wareham*, 1 Met. 438, 1844. In this case the corporate defendant undertook, without authority, to transfer to the plaintiff the right of taking oysters within its limits; contract held wholly void. See, also, *McCracken v. San Francisco*, 16 Cal. 591. *Infra*, secs. 383, 384. Compare *Herzo v. San Francisco*, 33 Cal. 134. That the contract of agents within the scope of corporate power may be ratified, or a contract implied from the enjoyment of the benefit of the consideration. *San Francisco Gas Company v. San Francisco*, 9 Cal. 453, 1858, opinion of *Field*, J.; *Backman v. Charlestown*, 42 N. H. 125. See *Bissell v. Railroad Company*, 22 N. Y. 258. *Post*, sec. 750.

¹ 2 Kent Com. 291; *Bank of Columbia v. Patterson*, 7 Cranch, 299 (1813—a leading American case); *Mott v. Hicks*, 1 Cow. 518; *Dunn v. Rector, &c.*, 14 Johns. 118; *Bank v. Dandridge*, 12 Wheat. 74; *Perkins v. Insurance Company*, 4 Cow. 645; *Davenport v. Peoria Insurance Company*, 17 Iowa, 276, and cases cited by *Cole*, J.; *American Insurance Company v. Oakley*, 9 Paige, 496; *Magill v. Kauffman*, 4 Serg. & Raw. 317; *Randall v. Van Vechten*, 19 Johns. 60; *Wayne County v. Detroit*, 17 Mich. 390; *Lesley v. White*, 1 Spears (S. Car.) Law, 31; *Canaan v. Derush*, 47 N. H. 211; *Lebanon v. Heath*, *Ib.* 353; *Adams v. Farnsworth*, 15 Gray, 423; *Shrewsbury v. Brown*, 25 Vt. 197; *Gassett v. Andover*, *Ib.* 342; *Peterson v. Mayor, &c. of New York*, 17 N. Y. 449, 453, 1858; *Danforth v. Schoharie Turnpike Company*, 12 Johns. 227; *Angell & Ames*, sec. 237; *Maher v. Chicago*, 38 Ill. 266; *Frankfort Bridge Company v. Frankfort*, 18 Ben. Mon. 41. *Supra*, sec. 374. Broom Com. on Com. Law, 561–570, where the English cases are collected.

² *Petersen v. Mayor, &c. of New York*, 17 N. Y. 449, 453; *Poultney v. Wells*, 1 Aiken (Vt.) 180; Where a city contracted with a railroad company to do certain work, and the company employed persons to do it, there is no implied contract on the part of the city to pay them, although the city saw them at work. *Alton v. Mulledy*, 21 Ill. 76, 1859.

Must be an authorized request. “No person can make himself a creditor of another by voluntarily discharging a duty which belongs to that other.” *Strong*, J., in *Salsbury v. Philadelphia*, 44 Pa. St. 303; *Baltimore v. Poultney*, 25 Md. 18; *Jeffersonville v. Ferry Boat*, 35 Ind. 19, 1870. In *Seibrecht v. New Orleans*, 12 La. An. 496, 1857, carpets were furnished for certain corporation courts, by order of the clerks or judges, but without any author-

raised against a corporation, where by its charter it can only contract in a prescribed way, except it be a promise for money received, or property appropriated under the contract.¹ So where the corporation orders local street improvements to be made, for which the abutters are the parties ultimately liable, and which, by the charter, must be made in a prescribed mode; if made without any contract, or a valid one, the doctrine of implied liability does not apply in favor of the contractor, unless, indeed, the corporation has collected the amount from the adjoining owners and has it in its treasury.²

§ 384. "The doctrine of *implied municipal liability*," says Mr. Chief Justice *Field*, in a case where the subject underwent very thorough examination, "applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake, or without authority of law, it is her

ity of the common council, and were worn out before the plaintiff presented his bill. It was contended that the city was liable *ex equo et bono*, having used, and not returned the carpets; but it did not appear that the council knew that they had been purchased for the city, and were being used in its buildings. The court denied the liability, saying that "The only safe rule is to hold that the city cannot be bound for any contract made without its authorization, expressed by a resolution of the common council." That an unauthorized contract, however advantageous, does not bind the corporation, see *Loker v. Brookline*, 18 Pick. 348; *Jones v. Lancaster*, 4 Pick. 149; *Wood v. Waterville*, 5 Mass. 294.

A contract was implied on the part of a city, which was bound to support its paupers and which had refused to pay a person who had furnished a pauper with necessaries. *Seagraves v. Alton*, 18 Ill. 371. Here it will be noticed that there was an express refusal on the part of the city to support the pauper, and yet a promise was *implied*. This implication is a pure fiction to support what the court regarded as a just claim.

¹ *McSpedon v. Mayor of New York*, 7 Bosw. 601; *McCracken v. San Francisco*, 16 Cal. 591; *Piemental v. San Francisco*, 21 Cal. 351.

² *Argenti v. San Francisco*, 16 Cal. 255—opinion of *Field*, C. J. A municipal corporation was holden liable, under its charter, upon an implied assumpsit to collect and pay over assessments awarded to property owners, for the opening of a street. *Wheeler v. Chicago*, 24 Ill. 105, 1860; see *infra*, secs. 388, 400, 408.

duty to refund it—not from any contract entered into by her on the subject, but from the general obligation to do justice, which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it ; or if used by her, to render an equivalent to the true owner, from the like general obligation : the law, which always intends justice, implies a promise. In reference to *money* or *other property*, it is not difficult to determine in any particular case, whether a liability with respect to the same has attached to the city. The money must have gone into her treasury, or been appropriated by her, and when it is property other than money, it must have been used by her, or be under her control. But with reference to *services rendered*, the case is different. Their acceptance must be evidenced by ordinance [or express corporate action] to that effect. If not originally authorized, no liability can attach upon any ground of implied contract. The acceptance upon which alone the obligation to pay could arise, would be wanting. As a general rule, undoubtedly, a city corporation is only liable upon express contracts, authorized by ordinance [or other due corporate proceedings]. The exceptions relate to liabilities from the use of money or other property which does not belong to her, or to liabilities springing from the neglect of duties imposed by the charter, from which injuries to parties are produced. There are limitations even to these exceptions, in many instances, as where property or money is received in disregard of positive prohibitions ; as, for example, the city would not be liable for moneys received upon the issuance of bills of credit, as this would be, in effect, to support a proceeding in direct contravention of the inhibition of the charter.” Nor for money received for

¹ Per *Field*, C. J., in *Argenti v. San Francisco*, 16 Cal. 255, 282, 1860.

“The law,” says an eminent Judge, “never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law. Assumpsit may be maintained against a municipal corporation in certain cases upon an implied promise, but the better opinion is that a promise to pay can never be implied in a case where the corporation possesses no power to contract.” Per *Clifford*, J., in *Burrill v. Boston*, 2 Clifford C. C. 590, 596. 1867. The subject is further expounded by the same learned justice in his

notes issued by it to circulate as money, in violation of *an* express statute and the public policy of the state.¹

§ 385. *Ratification of Unauthorized Contract.*—A

opinion in *The Collector v. Hubbard*, 12 Wall. 1, 12, 1870. See, also, *Curtis v. Fiedler*, 2 Black, 478.

¹ *Thomas v. Richmond*, 12 Wall. 349, 1870. The principles upon which the decision rests are admirably stated in the opinion of Mr. Justice Bradley.

Illustrations of implied liability.—City is liable for gas furnished to it with knowledge of the council, though no ordinance or resolution was passed authorizing it to be furnished. *Gas Company v. San Francisco*, 9 Cal. 453, 466, 1858—opinion of *Field*, J. If a city sells its *void* bonds, there is an implied assumpsit to repay the purchase-money. *Paul v. Kenosha*, 22 Wis. 266, 1867. Where a bridge corporation was requested by the city authorities to communicate to them the terms upon which the city might attach its water pipes to the bridge, to carry the water from one side of the river to the other, which the bridge company answered, fixing a sum, upon which the city council took no action, but proceeded to extend the water works and used the bridge, the court held the city was liable. *Bridge Company v. Frankfort*, 18 Ben. Mon. 41, 1857. Broom Com. on Com. Law, 567, where the English cases are cited in which corporations have been held *liable by reason of enjoying the benefits* resulting from particular contracts. *Post*, secs. 750, 751.

Mr. Harrison, in his excellent "Municipal Manual for Upper Canada," has digested the decisions in the province on the subject of the power of corporations to contract. He says (2nd ed. p. 19), "It is a principle applicable to all corporations that they must contract under seal. To this principle there are some exceptions. One of some moment has been created with regard to municipal corporations. It is that such a corporation is liable to be sued in an action of debt on simple contract for the price of goods furnished, or labor done at their request and accepted by them. *Fetterly v. The Municipality of Russell and Cambridge*, 14 U. C. Q. B. 433. Though in such a case there be no contract under seal, the law implies an undertaking by a corporation to pay for labor and materials employed in their service, and of which they have accepted and are enjoying the benefit, provided the purpose for which the labor and materials have been applied is one clearly within the legitimate object of their character. *Bartlett v. The Municipality of Amherstburgh*, 14 U. C. Q. B. 152; *Fetterly v. The Municipality of Russell and Cambridge*, 14 U. C. Q. B. 433; *Pim v. The Municipal Council of Ontario*, 9 U. C. C. P. 304; *Perry v. The Corporation of Ontario*, 23 U. C. Q. B. 391; *Nicholson v. The Guardians of the Bradford Union*, 1 L. R. Q. B. 620. The exception, however, does not extend to executory contracts, such as work, &c., *to be* done, but is confined to work in fact done and accepted. *McLean v. The Town Council of the Town of Brantford*, 16 U. C. Q. B. 347; *Wingate v. The Enniskillen Oil Refining Company*, 14 U. C. C. P. 379."

municipal corporation may *ratify* the unauthorized acts and contracts of its agents or officers, which are *within the corporate powers*, but not otherwise. Ratification may be inferred from acquiescence after knowledge of all the material facts, or from acts inconsistent with any other supposition. The same principle is applicable to corporations as to individuals.¹ The employment, however, by a municipal council, of an attorney to defend a policeman charged with an assault, does not adopt his act so as to render the city liable for the damages recovered against him.*

§ 386. Where work done for a corporation, without complete legal authorization, is beneficial to it, and the price reasonable, strong *evidence of the assent* of the corporation is not required; *but such assent must be shown*. Ratification of the acts of a committee in building upon the

¹ People v. Swift, 31 Cal. 26, 1866; Bleu v. Bear River Company, 20 Cal. 602, 1862; Peterson v. Mayor, 17 N. Y. 449, 453, 1858, and authorities cited, reversing S. C., 4 E. D. Smith, 413; San Francisco Gas Company v. San Francisco, 9 Cal. 453; Hoyt v. Thompson, 19 N. Y. 207, 218, 1859; Howe v. Keefer, 27 Conn. 538; Emerson v. Newberry, 18 Pick. 377; Hodges v. Buffalo, 2 Denio, 110, 1846; 5 *Ib.* 567; People v. Flagg, 17 N. Y. 584; S. C., 16 How. Pr. R. 86; Brady v. Mayor, &c. of New York, 20 N. Y. 312, affirming S. C., 2 Bosw. 178; Delafield v. State of Illinois, 2 Hill (N. Y.) 159, 176, 1841; S. C., 8 Paige, 531, and 26 Wend. 192; Mills v. Gleason, 8 Am. Law Reg. 693; S. C., 11 Wis. 470, 1860; Dubuque, &c. College v. Township, &c., 13 Iowa, 55; Merrick v. Plank Road Company, 11 Iowa, 74, *per Wright*, J.; Detroit v. Jackson, 1 Doug. (Mich.) 106; Crawshaw v. Roxbury, 7 Gray, 374; Burrill v. Boston, 2 Clifford C. C. 590, 1867.

A municipal corporation may ratify unauthorized expenditures, not *ultra vires*, which they deem beneficial to it, and such ratification, as in the case of natural persons, is equivalent to previous authority. Backman v. Charlestown, 42 N. H. 125; Harris v. School District, 8 Fost. (N. H.) 65; Wilson v. School District, 32 N. H. 118; Keyser v. School District, 35 N. H. 477; Episcopal Society v. Episcopal Church, 1 Pick. 372; Bank v. Patterson, 7 Cranch, 299; Randall v. Van Vechten, 19 Johns. 60; Trott v. Warren, 2 Fairf. (Maine) 227; Topsham v. Rogers, 42 Vt. 189; People v. Swift, 31 Cal. 26. In DeGrave v. Monmouth, 19 Eng. C. L. 300, it was held that the examination of weights and measures, which had been ordered by a mayor *de facto*, and which were the subject of the controverted contract, at a meeting of the corporation, and the subsequent use of some of them, recognized the contract for their purchase and made the corporation liable to pay for them. *Infra*, secs. 387, 651; Broom Com. on Com. Law, 567.

² Buttrick v. Lowell, 1 Allen (Mass.) 172, 1861. *Post*, secs. 399, 778.

land of the district a more expensive house than they were authorized to do by the vote of the corporation, cannot be inferred from the mere fact that the school is kept in it for a few weeks, there being no evidence that the corporation had knowledge of the over expenditure, or had taken any action on the subject.¹

¹ *Wilson v. School District*, 32 N. H. 118, 1855. See, further, as to effect of *use as a ratification*: *Kingman v. School District*, 2 Cush. 425; *Davis v. School District*, 24 Maine, 349; *Lane v. School District*, 10 Met. 462; *Chaplin v. Hill*, 24 Vt. (1 Dean) 628; *Fisher v. School District*, 4 Cush. 294; *Taft v. Montague*, 14 Mass. 285; *Keyser v. School District*, 35 N. H. 477; *Pratt v. Swanton*, 15 Vt. 147 (use of bridge by public).

In *Wilson v. School District*, above cited, Mr. Justice *Bell* well remarks: "In most cases where work and labor is performed upon real estate by contract, the *mere fact that the owner makes use* of the building or structure built upon his land, furnishes no evidence of approval or acceptance, because he has no choice to reject it. Alone, the use of such buildings gives no evidence of acceptance. Accompanied by silence, and absence of complaint, where to complain would be natural and suitable, or by any circumstance indicating acquiescence, it would be sufficient." 32 N. H. 125. As to *effect of acceptance of public work* by the agents of the town, see *Wadleigh v. Sutton*, 6 N. H. 15, 1832. Of school house built upon a *quantum meruit* employment by a committee, but without a legal contract. *Kimball v. School District*, 28 Vt. 8, 1855. See, also, *Corwin v. Wallace*, 17 Iowa, 334; *Zottman v. San Francisco*, 20 Cal. 96 (valuable discussion); *Jordan v. School District*, 38 Maine, 164, 1854; *Reichard v. Warren Co.*, 31 Iowa, 381, 1871. Surveyor of highways cannot recover of the town for work voluntarily performed, there being no contract, not even if beneficial. *Sikes v. Hatfield*, 13 Gray, 347, 1859. *Infra*, secs. 388, 400.

A public corporation is not liable for work done against, or even without, its direction or authority (such as building a bridge, road, school house, &c.) although these are afterwards used by the public or the district. *Loker v. Brookline*, 13 Pick. 343, 1832; *Knowlton v. Inhabitants, &c.*, 14 Maine (2 Shep.) 25, where note *critique* on, and remarks of C. J. *Mellen*, as to *Hayden v. Madison*, 7 Greenl. 79; *Morrell v. Dixfield*, 30 Maine (17 Shep.) 157, 160; *Davis v. School District*, 24 Maine (11 Shep.) 349; *Hayward v. School District*, 2 Cush. 419, 1848; *Ib.* 426; *Moor v. Cornville*, 13 Maine, 293, 1836, where the action was brought by the surveyor or supervisor of highways, who built a bridge without pursuing the course pointed out by law. *Allen v. Cooper*, 23 Maine, 133 (deciding that the power of a committee with authority to contract to make a road does not embrace power to accept the work or waive performance). But if the work be done under belief of authority, as where it was performed under a contract with a committee who assumed to have authority, but who, in fact, had none, then if the corporation accept it, or even knowingly avail itself of it, it will be liable to pay a reasonable compensation, and a promise thus to pay may

387. The *ratification*, whatever its form, must be by the *principal or authorized agents*. This is well illustrated by a case where, by statute, certain agents or officers of a *State* were authorized to borrow money for public use, and for that purpose to sell its bonds at not less than their *par* value. They exceeded their power by selling for *less than par*, and *on credit*. It was contended that this contract was *ratified*, because the governor, after he knew of the contract, signed the bonds and caused them to be delivered, and because the auditor and some of the other state officers acted under the contracts, drawing money and receiving payments. But it was held that these officials were likewise agents of limited authority—that, as they would have had no power to make the contracts originally, they could not ratify them; that ratification must come from the principal—the State—represented by its legislature.¹

be implied on the part of a corporation from the acts of its general agent, or an agent with powers of a general character [?]. *Abbot v. Herman*, 7 Greenl. 118; *Hayden v. Madison*, *Ib.* 79. “Perhaps these two cases carry the doctrine of the implied responsibility of corporations as far as it ought to be carried.” *Per Emery, J.*, in *Ruby v. Abysm. Society*, 15 Maine, 306, 308, 1839. As to extent of powers of New England towns, see *ante*, secs. 12, 13. And see, particularly, *Jordan v. School District*, and other cases cited, *supra*; *Baltimore v. Reynolds*, 20 Md. 1. 1862; *Hague v. Philadelphia*, 48 Pa. St. 527.

¹ *Delafield v. State of Illinois*, 2 Hill (N. Y.) 159, 175, where difference between ratification by a *state* and by other corporations and individuals is clearly set forth by *Bronson, J.*; affirming S. C., 8 Paige, 531; S. C. further, 20 Wend. 192. In further illustration of the text, see *Hague v. Philadelphia*, 48 Pa. St. 527; *Hotchin v. Kent*, 8 Mich. 526; *Marsh v. Fulton County*, 10 Wall. 676, 1870; *Dubuque, &c. College v. Dubuque*, 13 Iowa, 555; *Estey v. Inhabitants of Westminster*, 97 Mass. 324; *Branham v. San Jose*, 24 Cal. 585. *Attorney General v. Lathrop*, 24 Mich. 235, 1872.

In applying the doctrine that *unauthorized corporate acts may be ratified*, other principles of law must be borne in mind. The care which, in this respect, should be observed, is very clearly set forth by *Denio, J.*, in giving judgment in *Peterson v. Mayor, &c. of New York*, 17 N. Y. 449, 454, 1858. “For instance, no sort of ratification can make good an act without the scope of the corporate authority. So where the charter or a statute binding upon the corporation has committed a class of acts to particular officers or agents, other than the governing body, or where it has prescribed certain formalities as conditions to the performance of any description of corporate business, the proper functionaries must act, and the designated forms must be observed, and generally no act of recognition can supply a defect in

§ 388. *Letting to the Lowest Bidder.*—Where the charter or incorporating act requires the officers of the city to award contracts to the lowest bidder, a contract made in violation of its requirements is illegal; and in an action brought on such contract for the work, the city may plead its illegality in defence.¹

these respects." *Brady v. Mayor, &c.*, 20 N. Y. 812; *Hodges v. Buffalo*, 2 Denio (N. Y.) 110; 17 N. Y. 584; *Gates v. Hancock*, 45 N. H. 528; *Reilly v. Philadelphia*, 60 Pa. St. 467. *Supra*, secs. 385, 386.

Where the corporation can only act by *ordinance*, the ratification must be by ordinance. *McCracken v. San Francisco*, 16 Cal. 591, 1860; *Piemental v. San Francisco*, 21 Cal. 351; *Cross v. Morristown*, 18 N. J. Eq. 805, 1867. *Ante*, chap. XII.

Legislature may, within constitutional limits, *ratify or authorize ratification*. *Campbell v. Kenosha*, 5 Wall. 194; *Supervisors v. Schenck*, *Ib.* 772; *Keithsburg v. Frick*, 34 Ill. 405; *Mills v. Gleason*, 11 Wis. 470; *Winn v. Macon*, 21 Geo. 275; *Grogan v. San Francisco*, 18 Cal. 590, 1861; *Hasbrouck v. Milwaukee*, 21 Wis. 217, 1866; *Mills v. Charleton*, 29 Wis. 400, 1872. *Ante*, sec. 46; sec. 106, note. In *Shawnee County v. Carter*, 2 Kansas, 115, 1863, the Supreme Court of Kansas held invalid, as not being within the rightful scope of legislative power, an act of the legislature which declared valid and binding *bonds* which had been issued by the county officers on account of the county court house, and which *bonds* were not enforceable against the county because differing in form and substance from the warrants authorized by the statute. Such a strict limitation on legislative power is not generally asserted. See, on this point, chap. IV. *ante*.

¹ *Brady v. Mayor, &c. of New York*, 30 N. Y. (6 Smith) 312, 1859. It is intimated that it is not essential to the defence that the city should show a fraudulent collusion between the bidder and the officers awarding the contract. Whether the city is liable on a *quantum meruit* to one who has *bona fide* performed labor under a void contract where the work has been accepted and used, was not determined. *Ib.* S. C., 2 Bosw. 173; 7 Abb. Pr. R. 234; 16 *Ib.* 432. As further illustrating the text, see *People v. Flagg*, 17 N. Y. 584; *Peterson v. Mayor, &c.*, 17 N. Y. 457, referring to but expressing no opinion upon *Christopher v. Mayor, &c.*, 13 Barb. 567; *Appleby v. Mayor, &c.*, 15 How. Pr. R. 428; *Harlem Gas Company v. Mayor, &c. of New York*, 33 N. Y. 309; *Macey v. Titcombe*, 19 Ind. 153, 1862; *Bonesteel v. Mayor, &c.*, 22 N. Y. 162; *Smith v. Mayor, &c.*, 21 How. Pr. 1; *Nash v. St. Paul*, 8 Minn. 172, 1863; S. C., 11 Minn. 174; *White v. New Orleans*, 15 La. An. 667. *State v. Barlow*, 48 Mo. 17, 1871; *post*, sec. 669, note; *Breevort v. Detroit*, 24 Mich. 322, 1872; *May v. Detroit*, 2 Mich. Cir. C. Rep. 235, 1871. There can be no recovery against a municipal corporation for *extra* work, where the officers who requested it to be done had no authority. *Hague v. Philadelphia*, 48 Pa. St. 527; *Bonesteel v. Mayor, &c. of New York*, 22 N. Y. 162.

§ 389. The Supreme Court of Michigan has affirmed, while the Supreme Court of Wisconsin and of other states have denied, the proposition that where a city charter provides that no contracts shall be made by the city except with the *lowest bidder*, after advertisement of proposals, it does not prohibit the corporation from contracting to lay *Nicholson pavement*, though the right to lay it is patented and owned by a single firm. The question is close, but there seems, so far, to be a tendency in the courts to adopt the Wisconsin view.¹

§ 390. Where the municipal authorities were required by law to advertise for sealed proposals for making local improvements, and award the work to the *lowest responsible bidder*, to publish a notice of the award, and to allow the owners of the major part of the frontage to take the contract

Where the charter requires that all work for the city shall be let to the lowest bidder, after a prescribed notice of the time and place of letting shall have been given, and requires that similar notice shall be given where work is re-let, an assessment upon a lot for work done is void, if the contract was let or re-let without notice. *Mitchell v. Milwaukee*, 18 Wis. 92, 1864; see, also, *Wells v. Burnham*, 20 Wis. 112; *Hasbrouck v. Milwaukee*, 21 Wis. 217, 1866. Owner may, in such case, restrain the sale. *Id.* The contract must be the same that was advertised. *Nash v. St. Paul*, 11 Minn. 174.

¹ *Dean v. Charlton*, 23 Wis. 590, 1869; *Hobart v. Detroit*, 17 Mich. 246, 1868. *Dean v. Charlton*, *supra*, was approved by *Sutherland, J.*, in *Dolan v. Mayer, &c. of New York*, 4 Abb. Pr. (N. S.) 397, 1868, and followed by the Supreme Court of Louisiana in *Burgess v. Jefferson*, 21 La. An. 143, 1869, in which it appeared that the contractors with the city had the exclusive right to lay the patented pavement in the state. But under provisions of law relating to the City of New York which require all work to be done, and supplies to be furnished, to be by contract, where the expenditure will exceed \$1,000, and which direct all contracts to be made or let, after advertisement, to the lowest bidder, the City Council is not, in the opinion of the Court of Appeals, prohibited from making or paving a street in the manner, or with materials which do not admit of competitive bids. *In re Dugro* (58th street), 1873, not yet reported. Further, as to rights of lowest bidders, see *Attorney General v. Detroit*, Michigan Supreme Court, 12 Am. Law Reg. (N. S.) 149. *Post*, secs. 390, 699, n., 729, 791, n. Sequel to *Dean v. Charlton*, *supra*, see *Mills v. Charleston*, 29 Wis. 400, and *Dean v. Borchenius*, 30 Wis. 236, the legislature having validated the assessment. *Post*, sec. 652, and note. See, also, *in re Eager*, 46 N. Y. 100, 1871. Liability of city to patentee to pay him "royalty." *Bigelow v. Louisville*, 3 Fish Pat. Cas. 602, 1869. *Post*, sec. 764, n.

upon the same terms if they should desire, the court were of opinion that the city authorities had no power to do work which could not be contracted for in this mode, or which the abutters could not themselves perform, and that the award of a contract for a *patented pavement* to the assignee of the patentee, and who had the exclusive right to lay the same, was unauthorized, and the contract void.¹

As the purpose of such a provision in the charter is to secure, through competition, the most advantageous terms, something is necessarily left to the discretion, to be fairly exercised, of course, of the council, in the adoption of the course which will best attain the end; and it does not contravene this restriction to call for bids putting down various kinds of wood and stone pavements, some patented and some not, and afterwards, when all the proposals are in, selecting the one which is relatively the lowest or the most satisfactory, all things considered; but when the kind is thus selected, the lowest responsible bidder, who has the lawful power to perform his undertaking, has the absolute legal right to have the contract awarded to him.²

§ 391. In an action on a contract for lighting certain streets in New York City with gas, it appeared that the company had, by law, the exclusive right to furnish that part of the city with gas. The charter of the city, however, required all contracts for wants and supplies beyond a certain value, which the contract in suit exceeded, to be let to the *lowest bidder*, and the contract not being so let, it was claimed to be void. It was held that since the company had the exclusive right to furnish the gas (which prevented competition), the provision of the charter requiring contracts to be let to the lowest bidder (with a view to secure compe-

¹ *Nicholson Pavement Company v. Painter*, 35 Cal. 699, 1868. This case was decided before *Dean v. Charlton*, *supra*, and the opinion of *Sanderson, J.*, in its general scope, sustains the view of the Wisconsin court; and approving of the language of *Field, C. J.*, in *Zottman's Case*, 20 Cal. 102, treats "the *mode* as constituting the measure of the power." *Post*, chap. XIX.

² *May, Atty.-Genl. v. Detroit*, 12 Am. Law Reg. (N. S.) March, 1873, p. 149. Remedy of lowest bidder when contract is awarded to another *ib.* *Post*, chap. XXII. sec. 730a.

tition) was inapplicable, and the contract was sustained under the general corporate power of the city to contract for the lighting of its streets.¹

§ 392. Although notice has been published inviting *proposals* to do public work, yet the contract is incomplete until the proposal is actually accepted, and the corporation inviting the proposal is not, it seems, liable to damages for refusing to accept an offer, even though it be the lowest regular offer made. It is certainly not thus liable where the notice and the proposals, with respect to the amount and form of the security, do not comply with the requirements of the ordinances of the city, and where these provided that contracts should not be executed until laid before the common council.²

§ 393. *Contracts of Suretyship*.—A municipal corporation cannot, without legislative authority, become *surety* for another corporation or individual; cannot guaranty the bonds or obligations of another, or make accommodation indorsements. Such an authority cannot be implied or deduced from the general and usual powers conferred upon such corporations. Although such a corporation may have power directly to accomplish a certain object, and itself expend its revenues or money therefor, yet this does not give or include the power to lend its credit to another who may be empowered to effect the same object. Expending money by a city council, as agents or administrators of their constituents, is a very different thing from binding their con-

¹ Harlem Gas Company v. Mayor, &c., 33 N. Y. 309.

² Smith v. Mayor, &c. of New York, 10 N. Y. (6 Seld.) 504, 1853; affirming S. C., 4 Sandf. S. C. R. 221. "The notice inviting proposals to do the work," says Willard, J., delivering the opinion of the Court of Appeals (10 N. Y. 504), "did not, in my judgment, bind the street commissioner of the corporation to accept, at all events, the lowest bid, even though, in all respects, formal. Until the bid is accepted by some act on the part of the corporation, no obligatory contract was created." See, also, People v. Croton Aqueduct Board, 26 Barb. 240; State v. Directors, &c., 5 Ohio St. 234, 1855; Altemus v. Mayor, &c., 6 Duer, 446; Argenti v. San Francisco, 16 Cal. 255; Wiggins v. Phila., 2 Brews. (Pa.) 444; *Ib.* 443.

Further as to *lowest bidder*, see chapter on Mandamus, *post*, secs. 699, n., 791 n.

stituents by a contract of suretyship—"a contract which carries with it a lesion by its very nature."¹

§ 394. *Authorized Contracts.—Rights and Liabilities.*
—But with respect to authorized contracts a municipal corporation has the same rights and remedies, and is bound thereby, and may be sued thereon in the same manner as individuals. Thus, if such a corporation, duly empowered, enters into a partnership relation with private individuals with respect to the profits to be derived from a market house, its rights, especially as regards the copartners and the financial administration of the partnership property, are not different from those of an ordinary partner.²

¹ *Louisiana State Bank v. Orleans Navigation Company*, 3 La. An. 294, 1848. In this case the municipal corporation was sought to be made liable upon its guaranty of bonds issued by the navigation company, which the mayor, in the name of the municipality, was authorized, by certain resolutions of the council, to indorse. It was held that the council transcended its powers, and the guaranty did not impose any legal obligation upon the municipality. The disability of such corporations, without express power, to enter into contracts of suretyship, is shown in the masterly and exhaustive opinion delivered by *Eustis*, C. J.

A municipal corporation has no *implied power* to lend its credit or make accommodation paper for the benefit of citizens, to enable them to execute private enterprises. *Clark v. Des Moines*, 19 Iowa, 199, 224, 1865; 1 *Parsons N. & B.* 166; *Smead v. Railroad Company*, 11 Ind. 105.

The power to *borrow money* for any public purpose does not authorize the loan of the credit of the city. *Chamberlain v. Burlington*, 19 Iowa, 395; *contra*, *Rogers v. Burlington*, 3 Wall. 654, four judges dissenting. And see *Meyer v. Muscatine*, 1 Wall. 334. The author cannot but think that power to a corporation to borrow money should not be construed to give the power to loan its credit, but only to borrow money for legitimate and proper municipal objects, as shown by the charter or constituent act of the corporation. See *Payne v. Brecon*, 3 Hurl. & Nor. 572. *Ante*, sec. 81; *Bateman v. Mid-Wales Railway Co.*, Law Rep. 1 C. P. 510.

² *New Orleans v. Guillotte*, 12 La. An. 818, 1857. In *New Orleans v. St. Louis Church*, 11 La. An. 244, 1856, it was contended by the counsel for the city that even if certain resolutions in favor of the defendants allowing them to establish a cemetery within the city amounted to a contract, and though their repeal be not justified by the facts, and a violation of the contract by the city, yet that the latter has the power to violate its contracts, and the defendants have no redress except in an action for damages. But this doctrine was rejected by the court, which declared it to be as "unsound as it is novel," since a liability for damages is "the very opposite of a recognition of a right to violate the contract." *Per Buchanan*, J.

§ 395. So where a municipal corporation, acting within the scope of its powers, in order to secure the erection of gas works, passed an ordinance whereby the gas works and their income were placed in the hands of trustees, for the benefit of those who loaned money to execute the undertaking, *such ordinance is a contract*, and cannot be violated by the city, although it may deem it for the interest of its citizens to do so ; nor is it in the power of the legislature to authorize its violation.¹

§ 396. So where the mayor and council have, by the charter, power to make, in their corporate capacity, all such contracts as they may deem necessary for the welfare of the corporation, they may contract to *sell stock* owned by the city in a private corporation, to enable the city to pay its debts ; and the discretionary power with which the mayor and council are invested cannot, when *bona fide* exercised, be controlled by a court of equity, at the instance of property owners and tax-payers.²

§ 397. Power to a city corporation to pave streets at the expense of the owners and recover the amount from them if they fail themselves to pave when required by ordinance, gives the corporation the power to *purchase paving materials* and incur a debt for that purpose ; and in a suit by the vendor of such materials against the corporation, it is no defence that the council had not passed an ordinance before they purchased the materials, requiring the owners to pave : this is a matter to which a creditor is not bound to look. The question would be different if the city had sought to make the lot owner liable for the cost of paving ; in such case, it must show a strict compliance with the requirements of its charter.³

§ 398. *Settlement of Disputed Claims, &c.*—Growing out of its authority to create debts and to incur liabilities, a

¹ *Western Savings Fund Society v. Philadelphia*, 31 Pa. St. 175, 1854; *Same v. Same*, *Ib.* 185, 1858; *Ante*, chap. IV. sec. 41.

² *Semmes v. Columbus*, 19 Ga. 471, 1856. *Ante*, sec. 58; *post*, chapter on Corporate Property, sec. 445. *Post*, chap. XX.

³ *Bigelow v. Perth Amboy*, 1 Dutch. (N. J.) 297, 1855. *Post*, chap. XIX

municipal corporation has power to *settle* disputed claims against it, and an agreement to pay these is not void for want of consideration.¹ If it has obtained a contract which, by mistake or a change of circumstances, it deems to operate oppressively upon the other party, an agreement to make an *additional compensation*, or to modify or annul it, is not invalid for want of consideration.² A town may make a contract with a creditor whereby the latter agrees to discount or throw off a portion of his debt, and such an agreement, if founded on a sufficient consideration, will be enforced.³

§ 399. *Contracts with Attorneys.*—Resulting also from

¹ *Augusta v. Leadbetter*, 16 Maine, 45, 1839; *Bean v. Jay*, 23 Maine, 117, 121, 1843; *People v. Supervisors*, 27 Cal. 655; *People v. Coon*, 25 Cal. 648. It may annex conditions to a proposal of settlement, and is not liable unless the conditions are met. *Merrill v. Dixfield*, 30 Maine, 157, 1849. A municipality may, without special grant, issue new bonds in the place of old bonds which had been issued according to law. *Rogan v. Watertown*, 30 Wis. 259, 1879. *Infra*, sec. 412, n.

² *Bean v. Jay*, 23 Maine, 117, 121; *Meech v. Buffalo*, 29 N. Y. 198, 1864. Further, as to consideration: *Baileyville v. Lowell*, 20 Maine, 178, 1841; *Nelson v. Milford*, 7 Pick. 18, 1828—valuable opinion of *Parker*, C. J. See *People v. Stout*, 23 Barb. 349. *Ante*, chap. IV. sec. 44. The power to sue and be sued gives to a corporation the right to settle or compromise claims. Where a city has a judgment, from which an appeal is about to be taken, the council may, if done in good faith, cancel the judgment on the payment of costs, and such an agreement, when executed, is binding upon the corporation. *Petersburg v. Mappin*, 14 Ill. 193, 1852; *Supervisors v. Bowen*, 4 Lansing, 24, 1871.

Power to submit *to arbitration*. *Dix v. Dummerston*, 19 Vt. 263; *Griswold v. Stonington*, 5 Conn. 367; *Canal Company v. Swann*, 5 How. (U. S.) 83. Power exists unless the corporation be disabled. *In re Corporation, &c.*, 6 Upper Can. Law J. 207; *In re Corporation, &c.*, 19 Upper Can. Q. B. 450.

³ *Baileyville v. Lowell*, 20 Maine, 178, 1841. In this case, the town against which the creditor had an execution had the option, and was authorized to raise the money by loan or by assessment; and if in the latter mode, either at once or by instalments. If not raised and paid, the creditor was authorized to cause the property of the inhabitants to be distrained upon his writ. It was held, under these circumstances, that an agreement by the creditor, which was accepted and complied with by the town, that if the town would *at once* assess the amount required, and collect the same, he would abate a portion of his debt, was founded upon a sufficient consideration, and was binding upon him.

the power to make contracts, to own property, and to incur liabilities, is the authority in a municipal corporation, in the absence of express or implied restriction, *to employ an attorney,*¹ to conduct or defend suits in which the corporation is interested in its corporate capacity, and the corporation is bound to pay for services rendered by him, on due employment, without an express vote to that effect.² If a corporation attorney, after his term of office has expired, continues in the management of suits in which the corporation is interested, without objection from, and with the knowledge of, the corporation, and of his successor, he may, it has been held, recover for such services.³

¹ *Smith v. Sacramento*, 13 Cal. 531. May employ, unless specially restricted, an attorney in addition to the city attorney. *Ib.* See *Hornblower v. Dunden*, 35 Cal. 644. Compare *Clough v. Hart*, decided by the Supreme Court of Kansas, reported in 11 Am. Law Reg. (N. S.) 95. This case holds that there is *prima facie*, if not absolutely, an implied restriction upon city and county corporations to employ other attorneys to perform the precise duties, as prescribed by law, of the city and county attorneys elected by the people or provided for by incorporating statutes. A municipal corporation which has employed an attorney to file a bill seeking to destroy, by suit, the existence of the corporation itself, cannot apply the corporate funds in payment for such services. *Daniel v. Mayor, &c.*, 11 Humph. (Tenn.) 582, 1851.

Unless there is some special restriction the corporation may incur liability to compensate an attorney employed by it to conduct or defend suits which relate to the due performance of the duties or trusts with which, in its corporate capacity, it is charged by law. *Attorney-General v. Mayor, &c. of Norwich*, 2 Myl. & Cr. 406; *Lewis v. Mayor, &c. of Rochester*, 9 Com. B. (N. S.) 401, 1860. *Ante*, sec. 98. The Supreme Court of Wisconsin hold that no action will lie against a city having "the general powers of municipal corporations at common law" to recover compensation for services of counsel to aid in *criminal prosecutions* against persons who had lately been officers of the city for offenses committed under color of their official duties, resulting in pecuniary injury to the city. *Butler v. Milwaukee*, 15 Wis. 493. Compare *ante*, sec. 91, and cases there cited, as to power to offer rewards for offenders. *Buttrick v. Lowell*, 1 Allen (Mass.) 172.

² *Langdon v. Castleton*, 30 Vt. 285, 1858.

³ *Ib.* See *Harrington v. School District*, 30 Vt. 155; *supra*, sec. 383, as to implied contracts. Compare *Clough v. Hart*, 11 Am. Law Reg. (N. S.) 95. Compensation of *city attorney*. See *Carroll v. St. Louis*, 12 Mo. 444; *Orton v. State*, 12 Wis. 509; also, chapter on Corporate Officers, *ante*. Liability for attorney's fee under charter or special statutes, see *Brady v. Supervisors*, 2 Sandf. S. C. R. 460, affirmed 10 N. Y. (6 Seld.) 260, 1851, for reasons given by *Oakley, C. J.*, in 2 Sandf. 460; *Halstead v. Mayor, &c. of New York*, 3 Comst. 430; *State v. New Orleans*, 20 La. An. 172; *Bright v.*

§ 400. *Contracts for Local Improvements.*—A municipal corporation contracted with a paver to do certain work at a fixed price, of which it was to pay one-third and the owners two-thirds. It was judicially determined that the proprietors were, in law, liable to pay only one-third, and it was held, in an action by the paver against the corporation, that it was a *warrantor* for the remaining one-third, and it was held liable accordingly.¹ But where the charter or constituent act, in reference to improving streets, provides that the city shall be liable to the contractor for so much only of the improvement as is occupied by streets and alleys crossing the same, and that the owners of adjacent lots shall be liable for the rest, the city is not liable for the deficiency, in case the adjacent property does not sell for enough to pay the assessment, and though the owner be a non-resident.²

§ 401. A city charter required the consent of a majority

Hewes, 19 La. An. 666; Parker v. Williamsburg, 13 How. Pr. 250; Clough v. Hart, *supra*, and cases cited by Valentine, J.

¹ Tounier v. Municipality, 5 La. An. 298. See, also, Cronan v. Same, *Ib.* 537, where, by the construction of the contract, the city was held liable for the whole expense, the proprietors having refused to make payment. A contractor failing, for want of power in a city, to be able to get his pay from special assessments, the city was held liable to him, it being regarded as guaranteeing that it possessed the specific powers relied on by the contractor for his compensation. Maher v. Chicago, 38 Ill. 266, 1865. But see Chicago v. People, 48 Ill. 416, where the first case is explained and distinguished. See, also, Reilly v. Philadelphia, 60 Pa. St. 467; Sleeper v. Bullen, 6 Kansas, 300, 1870; Chicago v. People, 56 Ill. 327; Lowden v. Cincinnati, 2 Disney (O.) 203. Right of contractor to sue the corporation where, in consequence of its neglect, it would be nugatory to proceed against the owners or the property. See Michel v. Police Jury, 9 La. An. 67; Newcomb v. Same, 4 *Ib.* 233; Michel v. Same, 3 *Ib.* 123; Leavenworth v. Mills, 6 Kansas, 288, 1870. Compare Reock v. Newark, 33 N. J. Law, 129. Further, as to *local improvements*, see chap. XIX.; *post*, sec. 648; *supra*, secs. 383, 389.

² New Albany v. Sweeney (construing general Towns and Cities Act), 13 Ind. 245, 1859; Lucas v. San Francisco, 7 Cal. 463; Lovell v. St. Paul, 10 Minn. 290. Contracts with municipal corporations are construed with reference to the chartered or corporate powers of the city. 13 Ind. 245, *supra*. If the city corporation agrees with the contractor to collect the assessments from the abutting owners, a failure to do so will render it liable. Morgan v. Dubuque, 28 Iowa, 575, 1870. See Beard v. Brooklyn, 31 Barb. 142.

of property owners to make certain improvements, which, when made, were chargeable upon the *adjacent property*. An ordinance provided that contractors doing such work should look to the adjacent property, and not to the city, for their pay. Under these circumstances, the city entered into a contract with the plaintiff to grade a certain street, the plaintiff agreeing that he would receive his pay from the adjoining property. The plaintiff performed the work, and, inasmuch as the adjacent owners had never given their consent to the making of the improvement, he sued the city on the *contract*, to recover for the work done; and it was held that the action could not be maintained.¹

¹ *Leavenworth v. Rankin*, 2 Kansas, 357, 1864; *Swift v. Williamsburg*, 24 Barb. 427; *Goodrich v. Detroit*, 12 Mich. 279; *Johnson v. Common Council*, 16 Ind. 227; *New Albany v. Sweeney*, 13 Ind. 245.

Where the *contractor has agreed* to look for payment to the lot benefited, or to the owner, he cannot hold the city, unless it may be in cases where the whole proceeding is void, or the city neglects its duty. *Kearney v. Covington*, 1 Met. (Ky.) 339; *Smith v. Milwaukee*, 18 Wis. 63, 1864; *Finney v. Oshkosh*, *Ib.* 309; *Chicago v. People*, 48 Ill. 416; *Ruppert v. Baltimore*, 23 Md. 184; *Louisville v. Henderson*, 5 Bush (Ky.) 515, 1869.

A city advertised for proposals to do certain public work, and the plaintiff made proposals, which were accepted, without qualification, by an entry on city records; and it was decided that the statement in the published notice, "the expense of the work to be assessed," &c., was part of the contract, no other provision for payment having been made, and that the plaintiff could not maintain an action against the city until after the assessment and collection of his compensation, or until it or its officers failed to proceed with reasonable diligence, after the expense of the work was ascertained, to make and collect an assessment, and to pay over money thus collected. *Hunt v. Utica*, 18 N. Y. 442, 1858.

Extent of recovery by contractor against abutter where the work is done in a manner inferior to that stipulated for in the contract. *Creamer v. Bates*, 49 Mo. 523, 1872.

Further, as to the *rights and remedies of the contractor*; of the property owner, and the liabilities of the municipal corporation. *Smith v. Milwaukee*, 18 Wis. 63; *Foote v. Same*, *Ib.* 270; *Bond v. Newark*, 19 N. J. Eq. 376; *Fletcher v. Oshkosh*, 18 Wis. 228, 232; *Palmer v. Stump*, 29 Ind. 329; *McSpedon v. New York*, 7 Bosw. 601; *Reilly v. Philadelphia*, 60 Pa. St. 467; *Whalen v. La Crosse*, 16 Wis. 271; *Flournoy v. Jeffersonville*, 17 Ind. 169; *Creighton v. Toledo*, 18 Ohio St. 447; *Goodrich v. Detroit*, 12 Mich. 279; *Buffalo v. Halloway*, 7 N. Y. (3 Seld.) 493; *Storrs v. Utica*, 17 N. Y. 104; *Leavenworth v. Mills*, 6 Kansas, 288, 1870; *Sleeper v. Bullen*, 6 Kansas, 300; *Lansing v. Van Gorder*, 24 Mich. 456, 1872. *Post*, chapter on Taxation and Local Improvements. *Supra*, sec. 384. *Infra*, sec. 648. *Hendrick v. West Springfield*, 107 Mass. 541.

§ 402. It has been asserted that where the expense of making a local improvement is not to be raised by a general tax, but solely upon the property benefited, that a *failure of the corporation*, though it is only the agent of the owners to be assessed, *to discharge its duty*, by making the necessary assessment, or its unreasonable delay in collecting and paying over the money, gives the contractor a right to recover his compensation in an action against the corporation.¹ The right to a general judgment should, in our opinion, be limited, in any event, to cases where the corporation can afterwards reimburse itself by an assessment. For, why should all be taxed for the failure of the council to do its duty in a case where the contractor has a plain remedy, by *mandamus*, to compel the council to make the necessary assessment and proceed in the collection thereof with the requisite diligence?

§ 403. *Same.—Corporate Control by Stipulation.*—An agreement by a contractor to execute a public improvement under the general direction and supervision of a committee of a city, makes such committee—acting reasonably, and honestly, not arbitrarily and capriciously—exclusively the judge, not only as to materials and manner, but also as to the time of doing the work.² But where a written contract has been entered into between a municipal corporation and a contractor, a general provision of an ordinance that the work shall be done under the directions of certain officers, confers no authority upon them essentially to change or

¹ *Beard v. Brooklyn*, 31 Barb. 142, 1860. See *Goodrich v. Detroit*, 12 Mich. 279, 1864; *Cumming v. Mayor, &c. of Brooklyn*, 11 Paige, 596, 1845; *Baker v. Utica*, 19 N. Y. (5 Smith) 326, 1859; *Green v. Mayor, &c. of New York*, 5 Abb. Pr. Rep. 503. See, generally, as to assessments for public works: *Doughty v. Hope*, 3 Denio, 249; *Manice v. Mayor*, 8 N. Y. 120; *People v. Mayor, &c. of New York*, 5 Barb. 43; 8 Barb. 95; 23 Barb. 390; In principle sustaining the view suggested in the text: *Reock v. Newark*, 33 N. J. Law, 129. *Post*, sec. 778, note. And see opinion of *Field*, C. J., in *Argenti v. San Francisco*, 16 Cal. 255, 282, 1860. *Post*, chap. XX. on *Mandamus*.

² *Chapman v. Lowell*, 4 Cush. 378, 1849, relating to drains in the streets of the city. As to power of chancery to correct mistake of the engineer or other person whose decision both parties to the contract have agreed to abide by, see *Railroad Company v. Veeder*, 17 Ohio, 385

modify the provisions of the contract.¹ If, in a contract for a public work, the corporation employer reserves the right to make alterations in the form, dimensions, or materials of the work, the contractor is bound by any such alterations made in good faith; but such a clause does not authorize the employer to annul the agreement, or to stop the work in an unfinished state.²

§ 404. *Evidences of Indebtedness—Negotiable Bonds.* —We have elsewhere discussed the power of the legislature to authorize the issue of municipal bonds in aid of railway and other like enterprises,³ and have also considered the express and implied power of municipal corporations to borrow money and issue obligations therefor.⁴ It appropriately belongs to this place, however, to notice more at length the *different kinds of corporate evidences of debt*, and the rights and remedies of the holders thereof, and to this general subject will the remainder of the present chapter be devoted.

§ 405. *Bonds issued by municipal corporations on time, negotiable in form, and for sale in the market, under express authority from the legislature, are negotiable*, with all the qualities and incidents of negotiability. Such securities are made to raise money by their sale, and this object

¹ *Bonesteel v. Mayor, &c. of New York*, 22 N. Y. 162, 1860. But the authority of the corporation may be implied from its having by its own act rendered extra materials necessary to conform the work to the conditions of the contract. *Messenger v. Buffalo*, 21 N. Y. 196, 1860.

As to reserved right to *discontinue work* and annul contract. *Bietry v. New Orleans*, 24 La. An. 21, 1872.

² *Clark v. Mayor, &c. of New York*, 4 Comst. 338, 1850. Remedy of contractor, and measure of damages in such a case, considered. *Ib.* It is held, in Vermont, that a person who has contracted with the proper town officers to build a road, cannot proceed with his contract after notice of an appeal and recover of a town therefor. This decision is based upon a construction of the statute of that state by which the appeal is intended to stay or suspend all proceedings toward building the road, and the contractor was bound to take his contract, subject to the contingency of the appeal allowed by law. *Taft v. Pittsford*, 28 Vt. (Wms.) 286, 1856.

³ *Ante*, sec. 104, *et seq.*

⁴ *Ante*, sec. 81, *et seq.*, *supra*, sec. 392, note.

would be defeated if they were subject to equities (where the power to issue exists) in the hands of *bona fide* holders.¹

§ 406. *Ordinary Corporation Orders or Warrants.*—But *ordinary city, county, and town orders or warrants* are in some respects, *different* from bonds of the character just mentioned, and, in the author's judgment, the better opinion is, that there is no *implied* power in the officers of a town, county, or city corporation to issue warrants or orders which shall be free from equities in the hands of

¹ *Mercer County v. Hacket*, 1 Wall. 83, 1863 (denying *Diamond v. Laurence County*, 87 Pa. St. 368); *Meyer v. Muscatine*, 1 Wall. 384; *Gelpcke v. Dubuque*, *Ib.* 175; *Moran v. Miami County*, 2 Black, 733, 1862; *Clapp v. Cedar County*, 5 Iowa, 15; *Morris Canal Company v. Fisher*, 1 Stockt. Ch. 667, 1855; *Craig v. Vicksburg*, 31 Miss. 216; *Jackson v. Railroad Company*, 2 Am. Law Reg. (N. S.) 585; S. C., *Ib.* 748, and note of Judge *Redfield*; *Chapin v. Railroad Company*, 8 Gray, 575; *Lynde v. Winnebago County* (Iowa Court house bonds), U. S. Sup. Ct. Dec. Term, 1872; *Clark v. Janesville*, 10 Wis. 136; *Gould v. Sterling*, 23 N. Y. 464; S. C., 1 Am. Law Reg. (N. S.) 290, and note; *Clark v. Des Moines*, 199, 213, and cases cited. *White v. Railroad Company*, 21 How. 575; *Bank v. Railroad Company*, 3 Kern. 599; S. C., 4 Duer, 480; *Aurora v. West*, 22 Ind. 88; *Commissioners v. Bright*, 18 Ind. 93; *Barrett v. Schuyler County*, 44 Mo. 197; *De Voss v. Richmond*, 18 Gratt. 338; 7 Am. Law Reg. (N. S.) 589; *State v. Madison*, 7 Wis. 688; *Clark v. Janesville*, 10 Wis. 136, 1859; *Maddox v. Graham*, 3 Met. (Ky.) 56, 1859.

Coupons attached to such bonds are negotiable, and the holder may sue thereon in his own name without being interested in or producing the bonds to which they were originally attached. *Thompson v. Lee County*, 3 Wall. 327, 1865; *Murray v. Lardner*, 2 Wall. 110, 1864; *Knox County v. Aspinwall*, 21 How. 539, 1858; *Johnson v. Stark County*, 24 Ill. 75; *City v. Lamson*, 9 Wall. 478, 1869; *Railroad Company v. Otoe County*, 1 Dillon C. C. R. 338. An action on a coupon is *not barred* in less time than the bond to which it was originally attached. *City v. Lamson*, *supra*; *Lexington v. Butler*, 14 Wall. 282, 1871. *How declared on.* *Ring v. County*, 6 Iowa, 265; *Railroad Company v. Otoe County*, *supra*; *Wiley v. Board, &c.*, 11 Minn. 371. The better practice in the author's judgment is to set out in the declaration, the bond to which the coupon in suit was attached, or its legal effect and recitals. *Effect of judgment* for interest as an estoppel in a subsequent suit for interest or principal. *Bank v. Navigation Company*, 3 La. An. 294; *Beloit v. Morgan*, 7 Wall. 619. As to interest, *infra*, sec. 414.

Municipal corporations may plead the *statute of limitations* in actions against them on their bonds payable at a fixed time. *De Cordova v. Galveston*, 4 Texas, 470, 1849; see *Underhill v. Trustees*, 17 Col. 172; *Baker v. Johnson Co.*, 33 Iowa, 151.

holders; that the existence of such a power is not necessary as an incident to those ordinarily granted or to carry out the purposes of the corporation, and would be attended with abuse and fraught with danger. Ordinary warrants or orders, negotiable in form, may be made by the proper officers, and in many of the States such instruments may be transferred by delivery or indorsement, and the holder sue thereon in his own name, yet they are not commercial or negotiable paper in the hands of holders so as to exclude inquiry into the legality of their issue, or preclude defences thereto.¹ Ordinary warrants drawn by one officer on another officer of the same corporation are not bills of exchange, as such bills involve the idea of two parties; but are orders by the corporation on itself—mere directions to the treasurer to pay the amount to the bearer.²

¹ *Emery v. Mariaville*, 56 Maine, 315; *Clark v. Des Moines*, 19 Iowa, 199, 211-214, 1865, and cases cited; *Clark v. Polk County*, *Ib.* 248; *People v. County*, 11 Cal. 170, 1858; *Sturtevant v. Liberty*, 46 Maine, 457; *Smith v. Cheshire*, 13 Gray, 318, 1859; *Andover v. Grafton*, 7 N. H. 298, 1834; compare, however, *Bank v. Farmington*, 41 N. H. 32; *Dalrymple v. Whittingham*, 26 Vt. 345; *Inhabitants v. Weir*, 9 Ind. 224, 1857; *School District v. Thompson*, 5 Minn. 280, 1861; *S. P. Goodnow v. Commissioners*, 11 *Ib.* 31, 1865; *Hyde v. Franklin*, 27 Vt. 185, 1855; approved, *Taft v. Pittsford*, 28 *Ib.* 286; *Halstead v. Mayor*, 3 Comst. 430; S. C., 5 Barb. 218; *The Floyd Acceptances*, 7 Wall. 666, and reasoning of Mr. Justice *Miller*; *People v. Gray*, 23 Cal. 125; *Ib.* 447; *Hubbard v. Lyndon*, 28 Wis. 674, 1871. Warrants, duly signed and sealed, are *prima facie* valid, but open to defences. *Commissioners v. Keller*, 6 Kansas, 510; *Commissioners v. Day*, 19 Ind. 540, 1862. *Infra*, sec. 411.

Transferee or holder may sue in his own name. *Emery v. Mariaville*, 56 Maine, 315; *Crawford County v. Wilson*, 2 Eng. (Ark.) 214; *Clark v. Des Moines*, 19 Iowa, 199; *Campbell v. Polk County*, 8 Iowa, 467; *Clark v. Polk County*, 19 Iowa, 248. Otherwise in Massachusetts: *Smith v. Cheshire*, 13 Gray, 318, treating a town order, payable to bearer, as a mere chose in action which could not be enforced in the name of an assignee. *S. P. O'Donnell v. City*, 7 Phil. (Pa.) 234. In many of the states, "the real party in interest" may sue in his own name. In Vermont, as to right of holder of town and county orders to sue in his own name, see *Dalrymple v. Whittingham*, 26 Vt. 345; compare, *Taft v. Pittsford*, 28 Vt. 286, 289; *Hyde v. Franklin*, 27 Vt. 185. *Right of indorsee to sue or enforce by mandamus in his own name.* *Kelly v. Mayor, &c.*, 4 Hill, 263; *Clark v. School District*, 3 Rh. Is. 199; *Moss v. Oakley*, 2 Hill (N. Y.) 265; *Commissioners v. Day*, 19 Ind. 450; *Dively v. Cedar Falls*, 21 Iowa, 565; *Justices v. Orr*, 12 Geo. 137. *Post*, chap. XX. sec. 685.

² *Miller v. Thompson*, 3 Man. & Gr. 576; *Fairchild v. Railroad Company*,

§ 407. *Banking and trading corporations have implied or incidental power to make negotiable paper;*¹ and the same rule has, in some of the cases, been applied to municipal corporations. The ordinary warrants of such corporations, it is clear, do not cut off equities, and it is at least doubtful how far they have the *implied power* to make paper which shall have this effect. The adjudged cases on this point are conflicting.²

15 N. Y. 337; *Bulls v. Sims*, 23 N. Y. 570, 572; *Clark v. Polk County*, 19 Iowa, 247; *Harvey v. W. P. S. Co.*, 1 Doug. (Mich.) 193; *Dana v. San Francisco*, 19 Cal. 486; *Justices v. Orr*, 12 Geo. 137. Municipal certificates of indebtedness are not "*bills of credit*" within the meaning of the prohibition (art. 1, sec. 10) of the National Constitution. *Baltimore v. Board of Police*, 15 Md. 376, 1859. As a *county warrant* is an instrument by which the money, property, or rights of a county may be affected, it is such an one as *may be forged*. *State v. Fenley*, 18 Mo. 445, 1853. Requisites of indictment in such a case. *Ib.*

Liability as respects *scrip issued to circulate as money*. *Thomas v. Richmond*, 12 Wall. 349, 1870, and in which the city was held not to be liable. See, on this subject, *Allegheny City v. McClurkan*, 14 Pa. St. 81, 1850; *Jones v. Little Rock*, 25 Ark. 301; *Miller v. Lynchburg*, 20 Gratt. (Va.) 330, 1871; *Smith v. New Orleans*, 23 La. An. 5, 1871; *Clark v. Des Moines*, 19 Iowa, 199, 1865; *Dively v. Cedar Falls*, 21 Iowa, 565; S. C., 27 *Ib.* 227.

¹ *McCullough v. Moss*, 5 Denio, 567; *Straus v. Eagle Insurance Company*, 5 Ohio St. 59; *Mott v. Hicks*, 1 Cow. 513; *Attorney General v. Insurance Company*, 9 Paige, 470; 2 Kent Com. 299; 1 Parsons N. & B. 165; *Clark v. Des Moines*, 19 Iowa, 212. *Ante*, secs. 81, 82.

² *Kelly v. Mayor, &c.*, 4 Hill (N. Y.) 263; *Clark v. Des Moines*, 19 Iowa, 190, 213; *Carne v. Brigham*, 39 Maine, 39; *Clarke v. School District*, 3 Rh. Is. 199; *Goodman v. Commissioners*, 11 Minn. 31. *Ante*, secs. 81-83.

The ground has been broadly taken, that for debts and obligations lawfully created, any corporation, public as well as private, has the implied authority, unless prohibited by statute, charter or by-law, to evidence the same by the execution of a bill, note, bond, or other contract, and to secure the same by a mortgage, pledge, or other proper disposition of its property; that power to contract a debt carries with it the power to give a suitable acknowledgment of it; and there is no rule of law in the absence of a statute limiting the length of the credit. *Municipality v. McDonough*, 3 Rob. (La.) 242, 250, 1842; *Barry v. Merchants' Express Company*, 1 Saadf. Ch. 280; cited with approval in *Curtis v. Leavitt*, 15 N. Y. 9, 62, and in *Smith v. Law*, 21 N. Y. 296, 299, 1860; *Bank, &c. v. Chilicothe*, 7 Ohio, part II. 81, 1836; *Ketchum v. Buffalo*, 14 N. Y. 356, 1856, market house bonds given on twenty-five years' time held valid, and see cases cited on page 375, by *Wright, J.*; *Douglass v. Virginia City*, 5 Nev. 147. See and compare, however, *Bateman v. Mid-Wales Railway Company*, Law Rep. 1

§ 408. *Liability of Indorser of Warrants.*—Warrants or orders of a municipal corporation for the unconditional

C. P. 510. As to express power to issue bonds, &c., see also *Bank of Rome v. Village of Rome*, 18 N. Y. 38, 44, and cases cited; *Mills v. Gleason*, 8 Am. Law Reg. 688; *Louisiana State Bank v. Orleans Navigation Company*, 3 La. An. 294. State bonds negotiable. *Delafield v. Illinois*, 2 Hill, 159.

Power "to borrow money" held to include power to issue negotiable bonds or other usual securities to the lender. *Commonwealth v. Pittsburg*, 34 Pa. St. 496, 511; *Rogers v. Burlington*, 3 Wall. 654, 1865. *Ante*, sec. 81. Board of Supervisors of a county have not power to issue bill of exchange. *Canal Bank v. Supervisors, &c.*, 5 Denio, 517, 1848. Nor have village trustees. *Lake v. Trustees*, 4 Denio, 520. Corporate city has the power. *Kelly v. Mayor*, 4 Hill, 263; compare *Clark v. Des Moines*, 19 Iowa, 199, 213. In *Inhabitants, &c. v. Weir*, 9 Ind. 224, 1857, an action against a congressional township upon a promissory note made by the trustees, the court, *per Stuart, J.*, says: "There is no power to make notes conferred by the act of 1841. That act was the charter under which they acted. The trustees, as a corporation, had no power but such as that act expressly conferred, and such as might arise by implication, or essential to the exercise of those granted. Such a power is always expressed, even in bank charters. In so limited a corporation as a congressional township, the power to make promissory notes could hardly be implied. The case at bar cannot easily be distinguished in principle from *McClure v. Bennett*, 1 Blackf. 189, and *Mears v. Graham*, 8 Ib. 144."

Statutory power "to issue county orders" gives no authority to issue negotiable bonds payable at a future day, with interest coupons attached. The difference is substantial. *Goodnow v. Commissioners*, 11 Minn. 31, 1865; *County Commissioners v. Carter*, 2 Kansas, 115, 1860; *Hull v. County* 12 Iowa, 142. Statutory form of county warrants held to be directory, and a mere departure from this form is no defence to an action on the warrant. *Young v. Camden County*, 19 Mo. 309, 1854.

Authority to a city to subscribe for stock to be paid for by "certificates of loan," authorizes it to issue negotiable bonds with coupons attached—such "certificates of loan" and "bonds" being considered identical. *Amey v. Allegheny City*, 24 How. (U. S.) 364, 1860; see *Commonwealth v. Pittsburg* (power "to borrow money") 34 Pa. St. 496, 511; *Same v. Same*, 41 Pa. St. 278. Power by public corporations to issue negotiable bonds may be inferred from the power to subscribe for stock and to make payment for it. *Curtis v. Butler County*, 24 How. (U. S.) 435; *Bushnell v. Beloit*, 10 Wis. 195. Express legislative authority to a city to subscribe for stock in a railroad "as fully as any individual," authorizes the issue, by the city, of negotiable bonds in payment therefor. *Seybert v. Pittsburg*, 1 Wall. (U. S.) 272, 1863; approving, *Commonwealth v. Same*, 41 Pa. St. 278; *Rogers v. Burlington* (power to "borrow money for any public purpose") 3 Wall. 654, 1865; *Meyer v. Muscatine*, 1 Wall. 385; *Mitchell v. Burlington*, 4 Wall. 270. By resolution, the council authorized the mayor to borrow money of a bank and execute the note of the corporation therefor, instead of which

payment of money to a person named, or order, or bearer, have the character of negotiable paper, so far, at least, as to render parties indorsing them *liable as indorsers*.¹

he executed the *bond* of the corporation under the seal of the corporation. In an action on this bond by the payee, it was held that the corporation could plead *non est factum*, since the act of the mayor in executing a writing obligatory instead of a note, did not bind the corporation. *Little Rock v. State Bank*, 3 Eng. (Ark.) 227; see *Damon v. Granby*, 2 Pick. 345; *Randall v. Van Vechten*, 19 Johns. 60; *Bank v. Patterson*, 7 Cranch, 229; *Head v. Insurance Company*, 2 *Ib.* 127. Where towns were required "to purchase" liquors, and the selectmen were indictable if they failed to make provision for executing the law, it was held that a town might give a negotiable note for liquors actually purchased, and that the town could not defend against it in the hands of a *bona fide* holder on the ground that the liquors were sold in violation of the law of the state. *Bank v. Farmington*, 41 N. H. 32, 1860. What an indorsee is bound to inquire about, stated. *Ib.* 42.

The general doctrines of the text in sections 405-407, are coincident with the views of the United States Supreme Court in the recent case of the *Police Jury v. Britton*, 15 Wall. 566, 1872, where it was held that county officers in Louisiana, with the usual powers of such officers, have *no implied authority to issue negotiable paper* (bonds with coupons), payable in the future, to raise money or to fund an existing debt, which will cut off equities in the hands of *bona fide* holders. Such a power is not necessarily incident to the power to make specified expenditures or improvements, though it may be implied from certain express powers, as for example the power to borrow money. After stating other instances in which the power has been implied, Mr. Justice *Bradley* observes: "But in our judgment these implications should not be encouraged or extended beyond the fair inferences to be gathered from the circumstances of each case. It would be an anomaly, justly to be deprecated, for all our limited territorial boards, charged with certain objects of necessary local administration, to become fountains of commercial issues, capable of floating about in the financial whirlpools of our large cities." 15 Wall. 572.

¹ *Bull v. Sims*, 23 N. Y. 570, 1861. In this case the action was by an indorsee against the defendant as indorser of the following instrument:—

"MILWAUKEE, Aug. 1, 1859.

"The treasurer will, or on before the 1st day of February next, pay to the order of E. Sims, fifty dollars, *out of any funds belonging to the city not before specially appropriated*, the same having been this day allowed for dredging, and chargeable to the general city fund.

"R. R. LYNCH, *Clerk*.

H. L. PAGE, *Mayor*."

It was held that the defendant incurred the responsibility of an indorser of negotiable paper, and that the plaintiff was not bound to show the existence of sufficient funds in the city treasury to pay the warrants, and not specially appropriated at the time of its maturity. *Campbell v. Polk County*, 3 Iowa, 467; *Hodges v. Shuler*, 22 N. Y. 114; *Fairchild v. Ogden*.

§ 409. *Payment and Cancellation of Warrants.*— Payment by the treasurer or proper officer of a municipal corporation of its orders or warrants *ipso facto extinguishes* them. If lent, re-issued, or put into circulation again by the officer, after he has once obtained credit therefor, they are not valid securities, not even, it seems, in the hands of an innocent holder.¹

§ 410. *Rights and Remedies of Holder of Warrants.*— A creditor of a town is not bound to receive an order on the treasurer, but may sue upon his original cause of action.² But if he does receive it he is charged with the duty of presenting it to the treasurer, upon whom it is drawn, or of alleging facts which excuse presentment, before he can maintain an action upon it. As such an order is, in effect, an order by the debtor on himself, if presented and payment be refused, the town is liable instantly, and without notice of non-payment.³

burgh, &c. Railroad Company, 15 N. Y. 337. Compare as to liability of indorser: Keller v. Hicks, 22 Cal. 457.

¹ Canal Bank v. Supervisors, 5 Denio (N. Y.) 517, 1848. In this case it was held that where, without any fraudulent intent, the holder of valid county orders exchanged them with the treasurer for others which were in fact paid, but which had never been allowed him in his accounts, the debt represented by the valid orders was not extinguished, and was a sufficient consideration to support a settlement with the county allowing it. As to illegal orders in hands of *bona fide* holder: Halstead v. The Mayor, &c. of New York, 3 Comst. 430; affirming S. C., 5 Barb. 218. Payment to bearer in good faith exonerates the corporation. Sweet v. Carver Co., 16 Minn. 106, 1871.

² Benson v. Carmel, 8 Greenl. 112; Willey v. Greenfield, 30 Maine, 452, 1849.

³ Varner v. Nobleborough, 2 Greenl. 121, where *Mellen*, C. J., says: "No sound reason can be given why a town should be subjected to the perplexity of costs of an action before the payee of an order will do his duty and request the payment." "There is an implied engagement to conform to established usage, and present the order for payment." Benson v. Carmel, *supra*; Pease v. Cornish, 19 Maine (1 Appl.) 191, 1841. As to mode of presentment: Steel v. Davis County, 2 G. Greene (Iowa) 469; Campbell v. Polk County, 3 Iowa, 467. Where the payee has accepted county orders for a debt against the county, and has parted with such orders, he cannot sue the county for the original debt. Crawford County v. Wilson, 2 Eng. (Ark.) 214, 1846. See Allison v. Juniata County, 50 Pa. St. 351. An unpaid and dishonored warrant on the corporation treasurer is not, *prima facie*, at

§ 411. *Presumption of Liability.*—County and city orders signed by the proper officers are, *prima facie*, binding and legal. These officers will be presumed to have done their duty. Such orders make a *prima facie* cause of action. Impeachment must come from the defendant.¹

§ 412. *Defences.*—A municipal corporation is not estopped, after a warrant upon its treasury has been issued, to set up the defence of *ultra vires*, or *fraud*, or *want*, or *failure of consideration*.² And it may maintain a bill in equity to cancel warrants illegally issued.³

least, an extinguishment or novation of the original debt. *Goldschmidt v. New Orleans*, 5 La. An. 436; *Short v. New Orleans*, 4 Ib. 281.

¹ *Commissioners v. Day*, 19 Ind. 450, 1862; 9 Ib. 359; *Commissioners v. Keller*, 6 Kansas, 510, 1870; *Clark v. Des Moines*, 19 Iowa, 211, 1865. Such debts “do not stand on the footing of those contracted under a special *conditional grant of power*.” 19 Ind. 450; *People v. Mead*, 24 N. Y. 114. *Ante*, chap. IX. p. 274, sec. 152; *supra*, sec. 406.

² *Thomas v. Richmond* (scrip to circulate as money). 12 Wall. 349 1870; *Webster County v. Taylor*, 19 Iowa, 117, 1865; *Clark v. Des Moines*, Ib. 199; *Clark v. Polk County*, Ib. 248; *Hodges v. Buffalo*, 2 Denio, 110; *Halstead v. Mayor, &c.*, 3 N. Y. 430; *Brown v. Utica*, 2 Barb. 104; *Anthony v. Inhabitants, &c.*, 1 Met. 286. The allowance of a claim by a county board is not final and conclusive. Such allowance is *prima facie* evidence of the correctness of the claim, “but,” says *Kingman*, C. J., “the settlement of an account by the county board is not more sacred than a settlement made by individuals.” The court therefore held, and properly so, that the allowance of a claim by the county was not an *adjudication* in the sense that it would conclude the county as to the amount allowed when sued upon the warrant drawn in pursuance of such allowance. *Commissioners v. Keller*, 6 Kansas, 510, 1870. *Post*, chap. XXIII. Warrants may, it seems, be *usurious*. *Clark v. Des Moines*, *supra*. *Post*, sec. 414, note.

³ *Pulaski County v. Lincoln*, 4 Eng. (Ark.) 320, 1849; *Webster County v. Taylor*, 19 Iowa, 117, 1865; *Trustees v. Cherry*, 8 Ohio St. 564, 1858; *Glastenbury v. McDonald*, 44 Vt. 450, 1872. In Mississippi a board known as the board of police are authorized by law to audit and allow, upon due proof, all claims against the county, and counties in that state cannot be sued directly. The action of the board in allowing claims for matters of county charge, and in ordering warrants to issue therefor, is final and conclusive on the county, in the absence of fraud, until it is reversed or vacated. *Carroll v. Board, &c.*, 28 Miss. (6 Cush.) 38, 1854. *Issuing new orders for old*: Effect of, see *Clark v. Des Moines*, 19 Iowa, 109; *Canal Bank v. Supervisors*, 5 Denio, 517; *Lake v. Trustees*, 4 Ib. 520. On warrants or orders the *statute of limitations* does not begin to run until payment

§ 413. *Payable out of a particular fund.*—If by law a particular claim is to be paid out of a *special fund*, a warrant or order issued therefor should be made payable out of such fund; if made payable from the treasury generally by the officers issuing it, the corporation is not bound by their act.¹ An order or warrant concluding with the words “and charge the same to the account of Union Avenue,” is payable out of the particular fund indicated, and is not a claim against the corporation.² But the distinction must be observed between orders payable out of a particular fund, and those which evidence a general corporate liability but are directed to be charged to a particular account.³

is denied. *Justices v. Orr*, 12 Ga. 137, 1852. See *Carroll v. Board, &c.*, 28 Miss. 38; *De Cordova v. Galveston (bonds)*, 4 Texas. 470; *City v. Lamson (coupons)*, 9 Wall. 478. *Supra*, sec. 406, note; *Baker v. Johnson County*, 33 Iowa, 151.

¹ *County Commissioners v. Cox*, 1 Ind. 403, 1855; *Campbell v. Polk County*, 49 Mo. 214, 1872. *Post*, chap. XX.

² *Lake v. Trustees, &c.*, 4 Denio (N. Y.) 520, 1847, remedy of holder discussed; distinguished from *Kelly v. Mayor, &c. of Brooklyn*, 4 Hill, 263; and see *McCullough v. Mayor, &c.*, 23 Wend. 458; *Cuyler v. Rochester*, 12 Wend. 165; *Argenti v. San Francisco*, 16 Cal. 255, and note remarks of *Field*, C. J.; *Martin v. San Francisco*, *Ib.* 285; *Kingsberry v. Pettis Co.*, 48 Mo. 207, 1871. An instrument in this form:

“DECEMBER 31, 1836.

“*City of Brooklyn, ss.* To the City Treasurer. Pay A. L. or order. \$1500, for award No. 7, and charge to Bedford road assessment, &c.

“J. T., *Mayor*.

“A. G. S., *Clerk*.”

Held, 1st. Negotiable, and not payable out of any special fund. 2nd. Corporation was not discharged by failure to present and give notice, no damage or injury being sustained in consequence of the omission. *Kelly v. Mayor, &c.*, 4 Hill (N. Y.) 263, 1843; *Steel v. Davis County*, 2 G. Greene (Iowa) 469; *Campbell v. Polk County*, 3 Iowa, 467.

³ *Clark v. Des Moines*, 19 Iowa, 199, 222; *Edwards on Bills*, 143; *Pease v. Cornish*, 19 Maine, 191; *Campbell v. Polk County*, 3 Iowa, 467; *Commissioners v. Mason*, 9 Ind. 97; *Bayergue v. San Francisco*, 1 McAll. C. C. R. 175; *Bull v. Sims*, 23 N. Y. 570; *Montague v. Horan*, 12 Wis. 599. In an action on a county order payable out of the three per cent. fund, “as fast as the same shall accrue to the county,” it *must be alleged* that the county has received money from the specific fund named applicable to the order in suit, or that the order was fraudulently drawn upon a fund in which the county had no assets. *Commissioners v. Mason*, 9 Ind. 97, 1857. See chapter on *Mandamus*, *post*

§ 414. *Interest on Corporate Indebtedness.*—The rule in respect to interest on debts against municipal corporations, does not ordinarily differ from that which applies to individuals.¹ Under the Missouri statute, providing generally that creditors shall be allowed interest at the rate of six per cent. per anum, &c., it is held that county warrants draw interest after presentment to the treasury and refusal of payment by the treasurer, the court regarding the general statute as to interest broad enough to embrace all debtors—counties as well as individuals.² But in Illinois it is held that the debts of municipal corporations are payable at the treasury of the body; that interest on coupons—that is, interest on interest—cannot be recovered, unless there be a special agreement to that effect, since such corporations are not named in the act regulating interest. The court remarks: “Whatever power these corporations may possess to contract for the payment of interest, in the absence of any express legislation on the subject, we are of opinion that their indebtedness, in the absence of such agreement, does not bear interest. If such instruments (coupons) could in any event draw interest without an express agreement, it could only be after a proper demand of payment. Until a demand is made, such a body is not in default. They are not like individuals—bound to seek their creditors to make payments of their indebtedness.”³

¹ Langdon v. Castleton, 30 Vt. 285 (action on book account).

² Robbins v. County Court, 3 Mo. 57, 1831. In Iowa, coupons on county and city bonds are held to *draw interest*. Rogers v. Lee County, 1 Dillon C. C. R. 529. See Railroad Company v. Evansville, 15 Ind. 395; Hollingsworth v. Detroit, 3 McLean, 472; Pruyn v. Milwaukee, 18 Wis. 367. If, under authority to issue bonds with eight per cent. interest, bonds be issued drawing twelve per cent., they are valid and bear interest at the statutory rate. Quincy v. Warfield, 25 Ill. 317. *Usury.* Whether usury can be predicated of a sale or issue by a corporation of its securities. So held, Danville v. Sutherlin, 20 Gratt. (Va.) 555, 1871; Lynchburg v. Norvell, 20 Gratt. (Va.) 601, 1871; Clark v. Des Moines, 19 Iowa, 199. May be made *payable out of the state*. Meyer v. Muscatine, 1 Wall. 384; Maddox v. Graham, 2 Met. (Ky.) 56.

³ Pekin v. Reynolds, 31 Ill. 529, 1863; S. P. Chicago v. People, 56 Ill. 327, 1870; People v. Tazewell County, 22 Ill. 147; Johnson v. Stark County, 24 Ill. 75. In Madison County v. Bartlett, 1 Scam. (Ill.) 67, it was held that counties were not liable to pay interest on their orders or warrants,

§ 415. *Railroad Aid Bonds—Course of Decision in the United States Supreme Court.*—There has been much controversy, as heretofore shown, in the different States concerning the *constitutional power* of the legislature to authorize municipal and public corporations to subscribe for stock in private railway companies and to levy and collect taxes to pay indebtedness thus created.¹ Respecting nego-

not being named in the statute regulating interest, and the common law not allowing it to be recovered. So in Pennsylvania: *Allison v. County*, 50 Pa. St. 351. In that state a county is not suable on its warrants, but suit must be on original claim. *Ib.* *Post*, chap. XX.

¹ *Ante*, chap. VI. sec. 104, *et seq.* Since the decision of the Supreme Court of Michigan, in the *People v. Township Board of Salem*, 20 Mich. 452; S. C., 9 Am. Law Reg. (N. S.) 487, before mentioned (*ante*, sec. 105), the question arose in the United States Circuit Court for the western district of Michigan, in an action on municipal railway aid bonds, whether the federal court was *concluded* by the judgment of the Supreme Court of the state, and, if not, whether the holder of bonds, issued in full compliance with the statute, could recover thereon. *Emmons*, Circuit Judge, in an elaborate opinion, holds, as to bonds issued *before* the decision of the Supreme Court of the state, that the federal courts are not concluded thereby, and that the constitutional power of the legislature to authorize their issue, in the absence of special limitations, must be regarded as settled, at least as respects the federal tribunals. The opinion displays great research and learning, and will be found reported under the name of *Talcott v. Township of Pine Grove*, vol. I. Bench and Bar (N. S.) 50, 1872. The Supreme Court of Michigan adheres to its opinion on this subject in the latter case of the *People v. State Treasurer*. *Ante*, sec. 105. The course of reasoning of *Emmons*, J., in this case is coincident with that of the Supreme Court of the United States in the recent case of *Olcott v. The Supervisors*, December Term, 1872. In the case just mentioned the Circuit Court of the United States, sitting in Wisconsin, decided that since the Supreme Court of that state had held a certain act under which the bonds in question were issued to be unconstitutional, and had never holden otherwise, that this construction, though given after the bonds were issued, was binding upon or should be followed by the federal courts. But the Supreme Court of the United States was of the opinion that, inasmuch as the decision of the State Supreme Court was not based upon any special and peculiar provision of the state constitution, but upon general principles of law, and related to contracts, the case was not one in which the decision of the State Court had any other than a persuasive force, and it reversed the judgment of the Circuit Court, and held that the bonds could be enforced. *Post*, sec. 416b.

In *Gilchrist v. Little Rock*, 1 Dillon C. C. R. 261, and in *Ranlett v. Leavenworth*, *Ib.* 263, the Circuit Court of the United States for the eighth circuit, prior to any decisions of the Supreme Courts of the states of Arkan-

liable bonds issued under legislative authority by municipalities for such and kindred purposes, when in the hands of *bona fide* holders, the Supreme Court of the United States, influenced, doubtless, by a keen sense of the injustice and odium of repudiation, has at all times displayed a strong determination effectually to enforce their payment.

§ 416. Accordingly, it has refused to be concluded by decisions of the state court against the validity of such bonds, made after the bonds were issued;¹ it has adopted, when necessary to protect the *bona fide* holders of such securities, liberal constructions or statutes and charters authorizing the creation of such debts;² against such holders it has given no favor to defences based upon mere irregularities in the issue of the bonds or non-compliance with preliminary requirements, not going to the question of power to issue them;³ and has held that the Circuit Courts of the United States were clothed with full authority, by *mandamus* or otherwise, to enforce the collection of judgments rendered therein on such bonds, and that this authority could not in the least be interfered with, either by the legislature or the judiciary of the states.⁴ It has upheld

Illinois and Kansas as to the constitutional validity of municipal railway aid bonds, declined to pronounce such bonds in the hands of *bona fide* holders to be void for the want of authority in the state legislature to authorize their issue. History of the Iowa municipal bond cases. *King v. Wilson*, 1 Dillon C. C. R. 555.

¹ *Gelpcke v. Dubuque*, 1 Wall. 175, 1865; *Havemeyer v. Iowa County*, 3 *Ib.* 294; *Thompson v. Lee County*, *Ib.* 827; *Lee County v. Rogers*, 7 *Ib.* 181; *Butz v. Muscatine*, 9 *Ib.* 571; *Olcott v. Supervisors*, December Term, 1872; *Post*, sec. 416*b*; *City v. Lamson*, 9 Wall. 477; *Campbell v. Kenosha*, 5 Wall. 194, 1866. Read last two cases in connection with *Foster v. Kenosha*, 12 Wis. 616, which, in effect, is overruled or disregarded. See on this point *Steines v. Franklin County*, 48 Mo. 167; *Columbia County v. King*, 13 Florida, 451.

² *Gelpcke v. Dubuque*, *supra*; *Meyer v. Muscatine* (charter authorizing borrowing of money), 1 Wall. 384; *Rogers v. Burlington*, 3 *Ib.* 654; *Van Hostrup v. Madison City*, 1 Wall. 291; *Seybert v. Pittsburg*, 1 Wall. 272.

³ *Knox County v. Aspinwall*, 21 How. 539; *Moran v. Commissioners*, 2 Black, 722; *Bissell v. Jeffersonville*, 24 How. 287; *Marsh v. Fulton County*, 10 Wall. 676, 1870.

⁴ *Von Hoffman v. Quincy*, 4 Wall. 535; *Galena v. Amy*, 5 *Ib.* 705; *Riggs*

and protected the rights of such creditors with a firm hand, disregarding, at times, it would seem, principles which it applied in other cases, and asserting the jurisdiction and authority of the federal courts with such striking energy and vigor as apparently, if not actually, to trench upon the lawful rights of the states and the acknowledged powers of the state tribunals; yet, upon the whole, there is little doubt that its course has had the approval of the profession in general and of the *public*, and it will be well if it shall teach municipalities the lesson that if, having the power to do so conferred upon them, they issue negotiable securities, they cannot escape payment if these find their way into the hands of innocent purchasers. Unfortunately, as will presently appear, the decisions on this important subject in the Supreme Court of the nation, and in some of the state courts, are not in all respects harmonious.¹

§ 416*a*. Under the line of decision in the several States heretofore adverted to, sustaining the constitutionality of municipal railway aid bonds,² millions upon millions of these securities have been issued by townships, counties and cities in the different states, and sooner or later their issue has been quite generally, though not always, followed by attempts to escape payment. The misrepresentations which have oftentimes induced the issue of the bonds, and the disappointment arising from the over-estimated benefits of the roads to the localities which aided their construction, make the attempts to avoid payment of the bonds not unnatural, and more excusable than they would otherwise be. The judicial history of these attempts is found in the law reports of the different states and in those of the federal tribunals; and a comparison of their judgments shows such a diversity of opinion upon some important questions connected with such securities as to render it most expedient to refer separately to the decisions of the two classes of courts. It is

v. Johnson County, 6 *Ib.* 166; *Butz v. Muscatine*, 8 *Ib.* 375. See, also, *post*, chap. XX. on Mandamus, and cases there cited.

¹ The general questions relating to the *power* to aid railways are considered in a previous chapter. *Ante*, chap. VI. sec. 104, *et seq.*

² *Ante*, sec. 104, *et seq.*

particularly important to notice with some fullness and care the opinions of the Supreme Court of the United States, since, for the reasons above-mentioned, the course of this tribunal and of the state tribunals has been such as to draw to the federal courts, in most of the states, all, or nearly all, of the litigation arising from this source. Wherein the state courts and the federal courts differ, and wherein they agree, will best appear by referring to some of the principal adjudications.

§ 416*b*. In the well-known *Iowa municipal railway aid bond cases*,¹ the bonds were issued *after* the State Supreme Court had affirmed the constitutional power of the legislature to authorize their issue, and *before* the same court had reversed its holding in this respect; and in these cases the Supreme Court of the United States held it was at liberty to take, and it did take, the view which obtained in the highest judicial tribunal of the state at the time the bonds were issued; and hence it adjudged that the bonds were binding upon and enforceable against the municipalities and counties, although the Supreme Court of the State was at the same time holding that under the constitution and laws of Iowa the bonds were utterly void. Subsequently, the Supreme Court of the United States went farther, and in a recent case it held that such bonds in the hands of innocent holders are valid, although the State Supreme Court had held otherwise, the latter basing its judgment, however, upon the general principles of the law and not upon any special and peculiar provision of the constitution of the state.² It seems quite clearly to be the doc-

¹ *Gelpcke v. Dubuque*, 1 Wall. 175, 1865; *Thompson v. Lee Co.*, 3 Wall. 327, 1865; *Havemeyer v. Iowa County*, 8 Wall. 294; *Rogers v. Burlington*, 8 Wall. 654, 1865; *Mitchell v. Burlington*, 4 Wall. 270; *ante*, sec. 416; *Lee County v. Rogers*, 7 Wall. 181, 1868; *Butz v. Muscatine*, 8 Wall. 575; *King v. Wilson*, 1 Dillon C. C. 555, 1871, gives a view of the decisions of the state and federal courts upon the subject of municipal railway aid bonds in Iowa. That obligations of contracts cannot be impaired by subsequent decisions see, also, *Chicago v. Sheldon*, 9 Wall. 50; *City v. Lawson*, 9 Wall. 477, 1869.

² *Olcott v. Supervisors, &c.*, U. S. Sup. Court, Dec. T. 1872. *Ante*, sec. 415, note.

trine of the United States Supreme Court upon this subject, that it is not *concluded* by the decisions of the state courts in *any case* where they are made *after* the bonds are issued and have been sold in the markets ; and such is undoubtedly its doctrine in all cases relating to this class of securities, where the questions involved do not turn upon the construction of peculiar provisions of the state constitution and laws. It has not decided that it would hold valid bonds issued *after* the Supreme Court of the state had held them to be invalid, and it would not probably so hold, since such a doctrine is not necessary to protect the innocent owners of such securities, and would involve the consequence of the federal courts setting up a policy in a state contrary to its constitution and laws as expounded by its authorized and rightful tribunals.¹

§ 416c. As preliminary to a more immediate view of the principal cases decided by the Supreme Court of the United States upon municipal railway aid securities, it may be observed that the *general result* of its decisions have been very clearly summarized in one of its most recent judgments relating to bonds of this character. “Bonds, payable to bearer,” says the learned Justice who delivered the opinion of the court, “issued by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the legislature, *are valid commercial instruments* ; but if issued by such a corporation which possessed *no power* from the legislature to grant such aid, they are invalid, even in the hands of innocent holders. Such a power is frequently conferred *to be exercised in a special manner*, or subject to certain regulations, conditions or qualifications, but if it appears that the bonds issued show by their *recitals* that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity with those regulations and pursuant to those conditions and qualifications, proof that any, or all, of those recitals are incorrect will not constitute

¹ King v. Wilson, 1 Dillon C. C. 555, 1871 ; Commercial Bank v. Iola 2 Dillon C. C. R. 1873. See, however, on this subject, Butz v. Muscatine. 9 Wall. 575, 1869 ; Olcott v. Supervisors, *supra*.

a defence to the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification which it is alleged was not fulfilled.”

It is definitely settled by this court that mere *irregularities* in the exercise of the power will not avail as a defence against an innocent holder for value, and that the only defence open against such a holder is the *want of power to issue the bonds*. Obviously, then, the most important inquiries to be considered are those which relate to the question, *when* the power exists or arises; *who* is to decide whether it existed or had arisen when the bonds were issued; and what will *estop* the corporation which issued them to set up in defence a non-compliance with antecedent or preliminary conditions; and it is these inquiries that we shall seek to illustrate by a reference to the decisions of the courts in cases which have arisen for judgment.

§ 417. *Leading Cases in the United States Supreme Court Noticed*—The case of *The Commissioners of Knox County v. Aspinwall*,¹ respecting the liability of municipal and public corporations on their negotiable railway aid bonds, deserves to be particularly noticed, as it is a leading case on this subject. The action was by a *bona fide* holder for value of certain coupons attached to bonds issued by Knox county, Indiana, in payment of a subscription to railroad stock. The defence was that the bonds were not binding upon the county, because the county commissioners possessed no power to execute them. By statute, the county commissioners were authorized “to take stock in the railroad, payable in county bonds, *provided a majority of the qualified voters* of said county, at a designated election, *shall vote for the same*.” The ground upon which

¹ *St. Joseph Township v. Rogers*, U. S. Supreme Court, December Term, 1872, not yet reported; opinion by *Clifford, J.*

In general throughout this work the author has not referred at length in the text to particular cases, but the importance of this subject has induced him to depart to some extent from his usual course.

² *Commissioners of Knox County v. Aspinwall*, 21 How. 539, 1858.

the want of authority to execute the bonds was placed by the county was the omission to comply with the requisition of the statute in respect to the *notices* for the election (which the statute provided should be held on a fixed day), at which a vote was to be taken for and against a subscription to the stock of the railroad company. It was admitted in the case that the required notices were not given ; and the court seemed to concede "that this would be decisive against the authority of the county to issue the bonds, were it not for the question which underlaid it ; and that is, who is to determine whether or not the election has been properly held, and a majority of the votes cast in favor of the subscription ?" "Is it," the court inquires, "to be determined by the court, in this collateral way, in every suit upon the bond, or coupon attached, or by the board of commissioners, as a duty imposed upon it before making the subscription ?" The court were of the opinion, and so decided, that the county commissioners were the proper judges whether or not a majority of the votes in the county had been cast in favor of the subscription to the stock, and whether or not the election had been properly held, and that these questions cannot be determined collaterally in actions upon the bonds or coupons. The court, in assigning the reasons for this holding, speaking through Mr. Justice *Nelson*, say : "The right of the board [of county commissioners] to act in execution of the authority [conferred by the statute] is placed upon the fact that a majority of the votes had been cast in favor of the subscription ; and to have acted without first ascertaining it, would have been a clear violation of duty ; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. The board was one, from its organization and general duties, fit and competent to be the depository of the trust thus confided to it. The persons composing it were elected by the county, and it was already invested with the highest functions concerning its general police and fiscal interests." "We do not say," he adds, "that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached ;

but after the authority has been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. Much less can it be called in question to the prejudice of a *bona fide* holder of the bonds in this collateral way.”¹

§ 418. The author ventures to remark that he believes the decision to be right, and for the reasons thus clearly stated by this able and experienced judge. But as sustaining the decision, a further position by way of argument is taken which, unless it is to be understood in the limited sense herein suggested, he considers to be untenable, of a most dangerous nature, and subversive of an important principle in the law of agency applicable both to private and public agents. That position is this: that a purchaser of the bonds had a right to assume, from the mere fact that they were issued, that the condition on which the county was authorized to issue them had been complied with, and that a *recital* in the bonds that the requirements of the law had been met amounts to an *estoppel in pais* upon the corporation, of which the officers issuing the bonds were the public agents. That this is the position assumed by the court, will appear by the following extract: “Another answer,” continues Mr. Justice *Nelson*, “to this ground of defence is, that the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition to the grant of the power, had been obtained, from the fact of the subscription by the board to the stock of the railroad company, and the issuing of the bonds. The bonds, on their face, import a compliance with the law under which they were issued. ‘This bond,’ we quote, ‘is issued in part payment of a subscription of \$200,000, by the said Knox county, to the capital stock, &c. by order of the board of commissioners in pursuance of the 3d section of the act, &c. passed by the General Assembly of the State of Indiana, and approved January 15th, 1849.’ *The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power.*”²

¹ Commissioners of Knox County v. Aspinwall, 21 How. 539, 544.

² *Ib.* 545. If by this it is meant that where the power to issue bonds is

This principle has been reiterated and applied by the court in subsequent cases.¹ Notwithstanding the broad language

given upon the condition of a previous majority vote in favor of the proposition, the public or municipal officers can, where *no vote has been taken or the proposition has been voted down*, bind the county by the issue of bonds and false recitals therein, the author feels bound respectfully to insist that in his judgment, the principle is unsound, and certainly it is one which will entail needless and incalculable injury upon public and municipal corporations. These securities, it is true, are intended to be sold in distant markets, and therefore it cannot reasonably be required that purchasers shall be affected with irregularities, but they ought to be held to ascertain whether the substantial precedent conditions of the power have been, in fact, complied with, and it ought not to be in the power of public officers, unless the decision of this question is plainly committed to them, to bind the corporation for which they act by their mere statements of what is in point of fact untrue.

On grounds similar to those here suggested it has been held by the Supreme Court of Missouri that bonds issued where an election is required, but none ever held and no vote taken, are void, because of want of power to issue them—void in the hands of all persons; but they may be validated by the legislature. *Steines v. Franklin County*, 48 Mo. 167, 1871. *Wagner, J.*, in this case reviews the prior adjudications of the United States Supreme Court and of the Supreme Court of the State of Missouri, and limits the language used by the judges to the facts before them, and distinguishes between the case of irregularities in an election and no election whatever. See also *Carpenter v. Inhabitants of Lathrop*, Mo. Sup. Court, 1873, not yet reported.

¹ *Moran v. Miami County*, 2 Black, 722, 724, 1862. Referring to *Knox County v. Aspinwall*, the court observe that the main defence was, that the commissioners of the county had no power to execute the bonds, and hence they were not binding upon the county; but, says the Supreme Court of the United States, *per Wayne, J.*, in *Moran v. Miami County*, *supra*, “our answer and judgment was, that the bonds on their face import a compliance with the law under which they were issued; and that the purchasers of them were not bound to look further for evidence of a compliance with the conditions annexed to the grant of power to issue them.” * * * “We think and adjudge that the recitals in the bonds are conclusive, constituting an estoppel *in pais* upon the defendants in this suit.” (2 Black, 722, 724, 732.) *As to estoppel* in such cases: *Supervisors v. Schenck*, 5 Wall. 772, 1866; *Rogers v. Burlington*, 3 Wall. 654; *Cincinnati v. Morgan*, *Ib.* 275; *Mercer County v. Hackett*, 1 *Ib.* 83; *Meyer v. Muscatine*, *Ib.* 385, 393, *per Swayne, J.*; *Bissell v. Jeffersonville*, 24 How. 287; *Gelpcke v. Dubuque*, 1 Wall. 175, 203; *Pendleton Co. v. Amy*, 13 Wall. 297, 1871; *St. Joseph Township v. Rogers*, Decr. Term, 1872; S. C., 7 Albany Law Journ., 864. In the case last cited it was insisted that the bonds were invalid for want of the required vote. One of the answers of the court to this objection was that “the act of the legislature made it the duty of the supervisor who

in some of the opinions to the effect that where the *power* exists under any circumstances in the corporation to issue negotiable securities, the *bona fide* holder has the right to presume that they were duly issued, yet when the *facts* of the cases are considered in which such language is used, we are unable, after a careful review of the decisions of the Supreme Court, to say that they lay down the doctrine that *merely* by recital in the bonds, the corporation will, under all circumstances, in favor of an innocent holder, be estopped from showing that in point of fact no election whatever was holden, or that any other condition precedent to the exercise of the power has not been complied with. If upon a true construction of the legislative enactment, conferring the the authority, the corporation or certain officers, or a given body or tribunal, are invested with power to decide whether the condition precedent has been complied with, then it may well be that their recital of their determination of a matter *in pais* which they are authorized to decide, will, in favor of the bond holder for value, bind the corporation; and to this extent, and no further, as it seems to us, have the decisions of the Supreme Court gone, when critically viewed, upon the point of estoppel by *mere recital*.

§ 419. A correct view of this subject would seem to be this: Officers are the agents of the corporate body; and the ordinary rules and principles of the law of agency are applicable to their acts. Their unauthorized acts are not binding upon the corporate body of which they are the public agents. Ordinarily, their unauthorized representation that they have power to do an act is not binding upon

executed the bonds to determine the question whether an election was held, and whether a majority of the votes cast were in favor of the subscription, and inasmuch as he passed upon that question and subscribed for the stock and subsequently executed and delivered the bonds, it was clearly too late to question their validity where it appears, as in this case, that they are in the hands of an innocent holder."

Estoppel to set up irregularities in issue of bonds by reason of the subsequent *payment of interest*. *Supervisors v. Schenck*, 5 Wall. 772. Compare *Marsh v. Fulton Co.*, 10 Wall. 676.

Estoppel by retaining *proceeds of bonds*. *Pendleton County v. Amy*, 13 Wall. 297, 1871.

the corporation ; that is, the question is as to their power, *in fact and in law*, not what they have represented it to be. The only exception to this rule in addition to the one above suggested, to wit, where it is the sole province of the officers who issued the bonds to decide whether conditions precedent have been complied with, is where both parties have not equal means of knowledge as to the extent and scope of their powers, and where the particular character of their commission and authority is, from its nature and circumstances, peculiarly known to the officer or agent ; in which case the principal will, or may be bound by the false representations of the agent respecting his authority and its extent and scope ; but where the authority to act is solely conferred by statute, which, in effect, is the letter of attorney of the officer, all persons must, at their peril, see that the act of the agent on which he relies is within the power under which the agent acts ; and this doctrine is recognized by the Supreme Court of the United States in some of its judgments.¹ Accordingly, bonds issued in violation of an express statute or constitution are void, though in the hands of innocent holders, for value.²

§ 420. So in a subsequent case, similar in character, the common council of a city were, by virtue of various statutes, authorized to subscribe for stock in a railroad company, and to issue bonds in payment therefor *on the petition of three-fourths of the legal voters of the city*. Before the issue of the bonds, the council decided that three-fourths of the citizens had petitioned, and the bonds

¹ The Floyd Acceptances, 7 Wall. 666, 1868; Marsh v. Fulton County, 10 Wall. 676, 1870. See, also, Clark v. Des Moines, 19 Iowa, 199, 210, 1865; Treadwell v. Commissioners, 11 Ohio St. 183, 1860, reviewing and criticising Knox County v. Aspinwall, 21 How. 539. See, also, Gould v. Sterling (action on bonds), 23 N. Y. 464; S. C., 1 Am. Law Reg. (N. S.) 290, and note of Prof. Dwight; Starin v. Genoa, 23 N. Y. 452; People v. Mead, 36 N. Y. 224. United States v. City Bank of Columbus, 21 How. 356, 1858, is a very striking illustration of the general principle that a corporate officer cannot bind the corporation by his unauthorized acts or representations concerning the authority of himself or others. De Voss v. Richmond, 7 Am. Law Reg. (N. S.) 589; S. C., 18 Gratt. (Va.) 339, 1868.

² Aspinwall v. County of Daviess, 22 How. 364; Marsh v. Fulton County, *supra*.

themselves thus recited. The Supreme Court of the United States held that the council was the tribunal to decide whether the requisite number had petitioned; that it was contemplated that this question, which was one of fact, should be ascertained and conclusively settled prior to the issue of the bonds; and that when sued upon the bonds by innocent holders for value, parol testimony was inadmissible to show that the petitioners did not constitute three-fourths of the legal voters of the city.¹

¹ *Bissell v. Jeffersonville*, 24 How. (U. S.) 287, 1860. approving *Knox County v. Aspinwall*, 21 How. 539; *S. P. Railroad Company v. Evansville*, 15 Ind. 395, 1860. This is clearly right, for the reason that the council were the body to decide the preliminary fact, and because, also, according to the rule before stated, the fact was one not of a nature to be ascertained by purchasers in the market to whom the bonds were designed to be sold.

As to proceeding preliminary to issuing of bonds: Ante, sec. 108; *Commissioners v. Nichols*, 14 Ohio St. 260; *Atchison v. Butcher*, 3 Kansas, 304, 1865; *Mercer County v. Hacket*, 1 Wall. 83; *Rogers v. Burlington*, 3 *Id.* 654; *Moran v. Miami Co.* 2 Black, 722; *Flagg v. Palmyra*, 33 Mo. 440; *Commonwealth v. Commissioners, &c.*, 37 Pa. St. 237; compare, *Marsh v. Fulton County*, 10 Wall. 676, 1870; *Treadwell v. Commissioners*, 11 Ohio St. 183, 1860. *Post*, sec. 423. *Pendleton County v. Amy*, 13 Wall. 297; *City of Lexington v. Butler*, 14 Wall. 284; *Joseph Township v. Rogers*, December Term, 1872; S. C., 7 Albany Law Journal, 364; *Grand Chute v. Winegar*, 5 Wall. 572, 1872; S. C., 5 Chicago Legal News, 337.

A city was authorized to take stock in a railroad company "on the petition of two-thirds of the citizens, who are freeholders," &c. Bonds of the city were duly issued, signed by the proper officers and attested by the seal of the city, and on their face recited that they were issued by virtue of an ordinance of the city making the subscription. The minutes of the city council simply stated that "the freeholders of the city, *with great unanimity*, had petitioned," &c. It was held that the city council were the proper judges whether or not the required number had petitioned, and that the city, as against *bona fide* holders for value, was "concluded" by the ordinance "as to any irregularities that may have existed in carrying into execution the power granted to subscribe the stock and issue the bonds." *Van Hostrup v. Madison City*, 1 Wall. (U. S.) 291, 1863; *S. P. Meyer v. Muscatine* (where charter required "a majority of two-thirds of the votes given") *Id.* 384, 393; *Aurora v. West*, 22 Ind. 88, 1864; *contra*, *Peopie v. Mead*, 36 N. Y. 224.

Where the act authorizing a municipality to issue bonds was not to take effect until "approved by two-thirds of the electors present at a city meeting held for that purpose, and a copy of its doings lodged in the office of the secretary of state;" *bona fide* purchasers of such bonds are not bound to look beyond the certificate thus lodged, and are not affected by the action of the

§ 421. In another case,¹ the action was upon coupons payable to bearer belonging to negotiable bonds issued by a county in payment of stock subscribed in a railroad company. By an act of assembly, the county commissioners were authorized to subscribe the stock and issue the bonds only upon the following "restrictions, limitations, and conditions, and in no other manner or way whatever:"

1. "After, and not before, the *amount* of such subscription shall have been designated, advised, and recommended by a grand jury of the county." 2. Said "bonds shall, in no case, be *sold* by the railroad company *less than par*." 3. That the acceptance of this act shall be deemed the acceptance of another act fixing the gauges of railroads in the county of Erie. The plaintiff was a *bona fide* holder, for value, of a number of the bonds issued by the county. To defeat a recovery, the county on the trial offered to show, not that *no* recommendation by a grand jury was ever made, but that no *such* recommendation was made as the act

city, refusing at prior meetings to approve the act. *Society for Savings v. New London*, 29 Conn. 174, 1860.

Fraud in the election authorizing the subscription must be set up before rights have accrued. *Butler v. Dunham*, 27 Ill. 474; *People v. Supervisors*, 27 Cal. 655. Further as to the construction of *powers to aid in the building of railways*, see *ante*, chap. VI.; sec. 104 *et seq.*

¹ *Mercer County v. Hackett*, 1 Wall. 83, 1863. This case, and the case of *Woods v. Lawrence County*, 1 Black, 386, are cited by Mr. Justice *Hunt* in the recent case of *Grand v. Chute v. Winegar*, 15 Wall. 572, 1872; S. C., 5 Chicago Legal News, 337. The learned Justice says: "The same principles were announced in *Gelpcke v. The City of Dubuque*, 1 Wall. 175, and in *Meyer v. The City of Muscatine*, 1 b. 384. In the latter case the court said that if the legal authority was sufficiently comprehensive, a *bona fide* holder for value has a right to presume that all precedent requirements have been complied with. By the act of February 10, 1854, the legislature of Wisconsin authorized the supervisors of the town of Grand Chute to make a plank road subscription to the amount of ten thousand dollars. The bonds in question were signed by the chairman of the board of supervisors of that town, and recited that the subscription had been made by the supervisors of the town, and that these bonds were issued in pursuance thereof for the purpose of carrying out the provisions of that act. The plaintiff was the *bona fide* holder for value of the bonds in suit, and his title accrued before their maturity. The cases cited are an answer to the numerous offers to show want of compliance with the forms of law, or to show fraud in their own agents."

required. The following was the recommendation: The grand jury "would recommend (omitting the words 'designate and advise') the commissioners of Mercer county to subscribe an amount not exceeding \$150,000,"—but not otherwise designating the amount. The bonds referred on their face to the act of assembly and its date which authorized their issue, and recited that they were issued in *pursuance* thereof. This was regarded by the court not as an offer to show "that no law exists to authorize their issue, but as one to show that the recitals in the bonds are not true, and to show that they were *not* made 'in pursuance of the acts of assembly' authorizing them;" and following *Knox County v. Aspinwall*,¹ it was adjudged that the matters thus offered to be shown constituted no defence against a *bona fide* holder, on the principle that "where bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further." And following *Woods v. Lawrence County*,² it was also ruled that it was no defence against such a holder, that the bonds were sold by the railroad company less than par, they being negotiable and the plaintiff innocent. And it was also decided that the acceptance by the railroad company of the bonds authorized by the act, operated *per se* as an acceptance of the gauge law.

§ 422. In another case, authority to a city "to take

¹ *Knox County v. Aspinwall*, 21 How. 539.

² *Woods v. Lawrence County*, 1 Black, 386. In *Woods v. Lawrence County*, just cited, it was also held that where the statute requires the grand jury to fix the amount of a subscription to railroad stock, and to approve of it, and upon their report being filed empowers commissioners to carry the same into effect by making its subscription in the name of the county, and if these things be done agreeably to the law, the county can not afterwards deny its obligation to pay the amount subscribed. In a suit brought to recover the arrears of interest on such bonds, it is not necessary for the holder to show that the grand jury fixed the manner and terms of paying for the stock; nor is it a defense for the county to show that the grand jury omitted to do so. It is enough that the manner and terms of payment were agreed upon between the company and the commissioners. This case, among others, was cited and approved in *Grand Chute v. Winegar*, 15 Wall. 572, 1872; S. C., 5 Chicago Legal News, 337.

stock in any chartered company for making a road, or roads, *to the said city,*" was held, in favor of a *bona fide* purchaser of its bonds, to authorize it to subscribe to a railroad which, by the terms of its charter, and in fact, did not terminate at said city, but whose nearest terminus was forty-six miles distant, it appearing that there was, at the time of said subscription, another railroad leading from that terminus to the city.¹ Authority was given by the legislature to the city of Milwaukee to issue bonds in aid of a railroad company specially named, "and any other railroad company duly incorporated and organized for the purpose of constructing railroads leading from the city of Milwaukee," &c., and it was held, such having been the construction put upon it by the city authorities at the time, that the power to issue bonds was not confined to companies *then* in existence, but extended to companies afterwards created.²

§ 422*a*. In another case,³ the city was held liable upon bonds issued to a railway company under the following circumstances, viz. : the legislature authorized the city to subscribe on the condition of a majority vote; the city embodied three conditions in the proposition submitted to the

¹ Van Hostrup *v.* Madison City, 1 Wall. 291, 1863. See Aurora *v.* West, 9 Ind. 74; S. C., 22 Ind. 88, 96, 503. The decision in Van Hostrup *v.* Madison City was undoubtedly influenced by the natural desire to protect the holders of the bonds. Doubts cannot but be entertained that the Columbus and Shelby road, distant and between different points, was a road leading *to* Madison. See remarks of Nelson, J.

² James & Taylor *v.* Milwaukee, U. S. Supreme Court, December Term, 1872.

In Lynde *v.* Winnebago County, U. S. Supreme Court, December Term, 1872, a special submission, under the laws of Iowa, to a popular vote, was construed to give the requisite authority to issue the bonds of the county to raise money to build a court house. The case also holds that it was competent for the proper county official (the county judge) to visit New York for purposes connected with the disposition of the bonds, and while there, *and out of his jurisdiction, to issue and seal new bonds with a new seal procured at the time*, in exchange for bonds already issued, but not yet put on the market, and it was so held although the statute of the state provided that in the case of the *absence* of that officer the county clerk should take his place.

³ City of Lexington *v.* Butler, 14 Wall. 282, 1871.

voters, one of which was that \$1,000,000 should be subscribed by other parties; the vote carried; other parties did not subscribe the \$1,000,000; the city refused to subscribe and issue bonds, but was compelled to do so by a *mandamus* of an inferior court, whose judgment was afterwards reversed by the Court of Appeals of the state, which held that the city had no authority to take the stock or issue the bonds until the \$1,000,000 had been subscribed by other parties. Meanwhile, however, bonds were issued by the city, bearing its seal and signed by its mayor and clerk, reciting that they were duly issued under a specified act of the general assembly.

The Supreme Court of the United States held that a *bona fide* holder for value of these bonds, who had no actual notice of the facts relied on for a defence, could recover thereon. Mr. Justice *Clifford*, delivering the opinion of the court, makes use of this language in stating the ground of the judgment: "Admitted, as it is, that the corporation defendants possessed the power to subscribe for the stock and issue the bonds, it is clear that the plaintiff is entitled to recover upon the merits, as the repeated decisions of this court have established the rule that when a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and that they are no more liable to be impeached in the hands of such a holder than any other commercial paper." By the expression that it is admitted that the city "possessed the power to subscribe for the stock and to issue the bonds," reference is undoubtedly made to the act of the legislature which gave this power on condition of a majority vote, and possibly to the fact that it was admitted in the plea that the vote was cast in favor of the subscription, for otherwise it seems to have been denied that the power existed; and that it did not exist as between the city and the railroad corporation was decided by the Court of Appeals of the state. The substance of the decision of the United States Supreme Court in this case would seem to be that a *bona fide* purchaser of the bonds had a right to presume that the condition annexed by the city as to the \$1,000,000 of other subscriptions had been complied with, and thus viewed

the judgment of the court rests upon grounds whose soundness cannot admit of question. It is not an authority upon its essential facts in favor of the proposition that if the bonds had been issued without any vote, or attempt at a vote, they would have been binding in the absence of estoppel other than by recitals or other ground of liability.

§ 422*b*. In another case,¹ the authority to subscribe to the stock of the company was given on condition that the county should so vote by a majority of real estate holders residing therein. A subscription was made in 1853, and a certificate of stock issued to the county, which was received by it and still owned by it in 1869, when suit was brought. It did not appear that the bonds contained any recitals that conditions precedent had been complied with, or that the county had subsequently levied taxes to pay interest on the bonds. The county set up as a defence that there was no power to issue the bonds, because no vote of the people had ever been taken. The plaintiff being a *bona fide* holder, it was held, that he was entitled to recover, and that the county was *estopped* to set up that no vote was had. The ground of the estoppel is thus stated by Mr. Justice *Strong*: "The county received in exchange for the bonds a certificate of the stock of the railroad company, which it held about seventeen years before the present suit was brought, and which it still holds. Having exchanged the bonds for the stock, we think the county cannot retain the proceeds of the exchange, and assert against a purchaser of the bonds for value, that though the legislature empowered it to make them, and put them upon the market, upon certain conditions, they were issued in disregard of the conditions."

It will be observed that if the court had been of opinion that the bonds were enforceable in the hands of a holder for value though *no* election had in fact ever been held, the case would naturally have been put upon that ground.

§ 423. *State Court Decisions Referred to.*—The authority to subscribe to the stock of a railroad corporation may be *made conditional* on certain previous steps being

¹ *Pendleton County v. Amy*, 13 Wall. 297, 1871.

taken, as, for example, a prior authorization of the act by a majority of the qualified voters of the municipality or district to be affected, or a recommendation in its favor and a designation of the amount by a grand jury, and the statute may be so framed as to evince the legislative intention to be, that *no power* to subscribe or issue bonds shall exist unless this be done.¹ Thus, where the act authorizing a town to borrow money to pay for the stock subscribed expressly

¹ *Mercer County v. Pittsburg & Erie Railroad Company*, 27 Pa. St. 389, 1856; *Mercer County v. Hacket*, 1 Wall. 83; *Aurora v. West*, 22 Ind. 88, 508, 1864. *Ante*, sec. 104, *et seq.* *City and County of St. Louis v. Alexander*, 23 Mo. 483, 1856. In this last case the provision requiring a submission of the question to the voters "before the subscription hereby authorized shall be made," was held not merely directory, but mandatory. Where the enabling act requires the amount to be specified, a vote not specifying definitely the amount is, as to the immediate parties, void. *State v. Saline County*, 45 Mo. 242, 1870; following, *Mercer County v. Pittsburg, &c. Railroad Company*, 27 Pa. St. 389, and *Starin v. Genoa*, 27 N. Y. 439 (see *infra*), and distinguishing *Knox County v. Aspinwall*, 21 How. 539, and *Flagg v. Palmyra*, 33 Mo. 440. It should be remarked, however, that the case above referred to (*State v. Saline County*, 45 Mo. 242, 1870) was *mandamus* to compel the relator to deliver the bonds and to assess taxes to pay interest on bonds which had been issued, and the writ was denied because the amount of bonds to be issued was not specified; but subsequently, in *The State v. Saline County*, 48 Mo. 390, 1871, it was held that such bonds, when in the hands of an innocent holder for value, could be collected. What, in the opinion of the Supreme Court of Missouri, such a holder must show in the way of compliance with precedent conditions, in order to recover, see the recent case of *Carpenter v. Inhabitants of Lathrop*, 1873, not yet reported. This case seems in spirit if not in effect to depart from the earlier cases in that court upon this subject. See *Railroad Company v. Platte County*, 42 Mo. 171, where permissive words respecting an election to authorize subscriptions were held to be imperative. In the *Railroad Company v. Buchanan County*, 39 Mo. 485, the words that the County Court, after an affirmative vote by the people, "shall have power to subscribe," were held to leave it discretionary with the court whether to subscribe or not. In the case of the *People ex rel. v. Tazewell County*, 22 Ill. 147, it was held, under the general law of the state, that it was discretionary whether the county should subscribe all or but a portion of the amount voted by the citizens, and that county authorities might impose any proper conditions they might choose. So where the legislature, without conditions, provides for submitting the question of subscription to the voters of a township, the electors have the power to vote to subscribe on any conditions they may see proper to annex. *People v. Dutcher*, Ill. Sup. Court, May, 1871; see also *People v. Logan County*, 45 Ill. 139; *Veeder v. Lima*, 19 Wis. 280, 1865. *Post*, chap. XX.

provided that the officers thereof should "have *no power*" to do so until the written assent of two-thirds of the resident tax-payers had been obtained, this was held a condition precedent, without which the power did not exist.¹

¹ *Starin v. Genoa*, 23 N. Y. 439, 1861; *Gould v. Sterling*, *Ib.* 439, 456; distinguished, on this point, from *Bank of Rome v. Village of Rome*, 19 N. Y. 20. Under the act it was held that the *onus* was on the plaintiff to show affirmatively the written assent of the requisite number of tax-payers; and the manner in which this must be shown is considered at length. But see *Bissell v. Jeffersonville*, 24 How. 287; *Knox County v. Aspinwall*, 21 How. 539; *Mercer County v. Hacket*, 1 Wall. 83, heretofore referred to. In the *People v. Mead*, 36 N. Y. 224, 1867, the decision in *Starin v. Genoa*, and *Gould v. Sterling*, above cited, was adhered to by the Court of Appeals, though it was admitted that a contrary ruling as to the evidence of the assent of the tax-payers, had been made by the Supreme Court of the United States in favor of similar bonds in the hands of *bona fide* holders, and the case was distinguished from *Murdock v. Aiken*, and *Ross v. Curtis*, 81 N. Y. 606. Illustrating text, see *Benson v. Mayor, &c. of Albany*, 24 Barb. 248.

Where the statute gives the power to issue bonds when a majority of the tax-payers whose names appear upon the last preceding tax list or assessment roll as owning a majority of the taxable property in the corporate limits, make application to the county judge, by petition, &c., such a petition is essential to the jurisdiction of the county judge, and the authority conferred by the act will, on *certiorari*, be required to be exercised in strict conformity with the act in its letter and spirit. The petition, it was held, must be that of the tax-payers, and it is erroneous to count as petitioners those whose names are affixed, in their absence, under previous verbal authority. In such proceedings, where there are no provisions to the contrary, competent common law evidence of the facts to be established should be produced before the county judge, and this officer cannot act upon his personal knowledge. *The People v. Smith*, 45 N. Y. 772, 1871.

By its charter a city was authorized to take stock in railroads, "*provided*, that no stock shall be subscribed or taken by the common council, unless upon the petition of two-thirds of the residents of said city, who are freeholders of said city." It was held, in an action by the railroad company against the city on the contract of subscription, that it was the duty of the common council to determine whether the requisite number of the freeholders of the city had petitioned for the subscription, no other tribunal having been provided for that purpose; and having passed upon that question their determination is conclusive, unless it may be set aside in some direct proceeding for that purpose: *Railroad Company v. Evansville*, 15 Ind. 395, 1860; following and applying, *Knox County v. Aspinwall*, 21 How. 539; see, also, *Bissell v. Jeffersonville*, 24 How. 287, 1860; *Mercer County v. Hacket*, 1 Wall. 83; compare, however, *Veeder v. Lima*, 19 Wis. 280

§ 424. So, under an act providing "that no subscription or purchase of stock shall be made, or bonds issued, by any county or city, creating a debt for the payment of such subscription, unless a *majority of the qualified voters* of the county or city shall vote for the same," it was held that bonds issued without an election, or where the election was called by the wrong authority (as by the county court instead of the county board of supervisors), are void, *for want of power to issue them*, in whose hands soever they may be, and are not validated by the levy of taxes and the payment of interest thereon.¹ But this view was denied to be sound by the Supreme Court of the United States, which

1865; *Duanesburg v. Jenkins*, 40 Barb. 574; *Society, &c. v. New London*, 29 Conn. 174; *State v. Saline County*, 45 Mo. 242, 1870. Subscriptions to turnpike roads by the county judge, under acts of the legislature, were held unauthorized and void, it being admitted that an amount of stock sufficient, with the aid of county subscriptions, to complete each mile of road, had not been taken by *private subscription*, as required by the statutes. *Clay v. County*, 4 Bush (Ky.) 154.

¹ *Marshall County v. Cook*, 38 Ill. 44, 1865, commenting on and distinguishing *Mercer County v. Hackett*, 1 Wall, 83, and *Gelpcke v. Dubuque*, *Ib.* 175. See, also, *Shoemaker v. Goshen*, 14 Ohio St. 569; *Berliner v. Waterloo*, 14 Wis. 378; *Veeder v. Lima*, 19 Wis. 280, 1865; *Dunnovan v. Green*, 57 Ill. 80; *St. Joseph Township v. Rogers*, U. S. Supreme Court, December Term, 1872; S. P. as to ratification, *Marsh v. Fulton County*, 10 Wall. 676, 1870. The corporation is estopped—where the power to issue existed—from setting up *irregularities* in the issue of the bonds, after repeated payments of interest thereon. *Keithsburg v. Frick*, 34 Ill. 405; *Railroad Company v. Marion County*, 36 Mo. 294; *Mercer County v. Hubbard*, 45 Ill. 139; *Beloit v. Morgan*, 7 Wall. 619, 1868; *Schenck v. Supervisors*, 5 Wall. 772, 1866; compare, *Marsh v. Fulton County*, 10 Wall. 676. The municipal authorities, on *mandamus* or other proceedings to compel them to make subscription to the railroad company, may show that the election was influenced by it and its employes, by bribery and corruption. *People v. Supervisors*, 27 Cal. 655, 1865; *Butler v. Dunham*, 27 Ill. 474. *Post*, chap. XX.

Defective subscriptions may, of course, be *ratified by the legislature* in all cases where the legislature could originally have conferred the power. *Keithsburg v. Frick*, *supra*; *Copes v. Charleston*, 10 Rich. (So. Car.) Law, 491; *McMillen v. Boyles*, 6 Iowa, 304; *Ib.* 394; *Gelpcke v. Dubuque*, 1 Wall. 220 (note statute there construed); *People v. Mitchell*, 35 N. Y. 551; *Thompson v. Lee County*, 3 Wall. 327; *Bass v. Columbus*, 30 Geo. 845, 1860; *Bissell v. Jeffersonville*, 24 How. 287, 1860; *Campbell v. Kenosha*, 5 Wall. 194, 1866; *City v. Lamson*, 9 Wall. 477, 1869. *Ante*, secs. 42–44. *Steines v. Franklin County*, 48 Mo. 167, 1871; *Knapp v. Grant*, 27 Wis. 147, 1870.

decided, that an innocent holder for value of such bonds was entitled to recover upon them. The only defect in the execution of the power was that the election was ordered by the wrong authority, but the Supreme Court held that the conduct of the county in retaining the stock, and in levying taxes and paying interest for a series of years, estopped it to set up as a defence that the bonds were illegal, and it refused to follow the judgment of the Supreme Court of the State, which had held the same issue of bonds to be void.¹

§ 425. In a case in Ohio, where the legislature authorized "the county commissioners of any county *through or in which* a railroad might be located, to subscribe to the capital stock of the said company," and, for the purpose of paying therefor, "to borrow the necessary amount of money, for which they shall issue their negotiable bonds," &c., it was decided to be a defence to an action on the bonds (though by a *bona fide* holder), that the railroad was "never made or located through or in the county;" that it was "located and completed so as not to touch the county." The defence was held good, upon the ground that the authority to issue the bonds never existed.²

§ 426. It may be remarked, in conclusion, that this general survey of the adjudications shows some difference

¹ Supervisors of Marshall County v. Schenck, 5 Wall. 772, 1866.

² Treadwell v. Commissioners, 11 Ohio St. 183, 1860, reviewing and criticising, Aspinwall v. Commissioners of Knox County, 21 How. (U. S.) 539, approved in Bissell v. Jeffersonville, 24 How. (U. S.) 287, 1860. In Veeder v. Lima, 19 Wis. 280, 1865, Treadwell v. Commissioners, and Gould v. Sterling, before cited, are approved, and Aspinwall v. Commissioners, and Moran v. Miami County, are criticised. Compare State, &c. v. Van Horne, 7 Ohio St. 327; re-affirmed, State Trustees, &c., 8 Ohio St. 394, 401. The two cases last cited (7 Ohio St. 327, 8 *Ib.* 394), do not intend, probably, to assert the principle that the non-action of the tax-payers or inhabitants will supply a *want of power*, in the just sense of that expression, in the trustees to subscribe for the stock, or estop the *quasi* corporation from making the defence of *ultra vires*, if it existed.

Under a charter authorizing counties "through which" a given railroad "may pass" to subscribe to its stock, it was held that a county between the termini of the road might subscribe without waiting until the route was located, or built within the county. Woods v. Lawrence County, 1 Black, 386, 1861.

of judicial opinion (chiefly in cases involving the rights of innocent holders of negotiable municipal securities) respecting the evidence of the compliance with conditions precedent, and as to what will estop the municipality from showing a non-compliance in fact with such conditions. Yet, aside from these differences, the courts all agree that such a corporation may successfully defend against the bonds in whosoever hands they may be, if its officers or agents, who assumed to issue them, had no *power* to do so.¹ The officers of such corporations possess no general power to bind them, and have no authority except such as the legislature confers. If the statute authorizes such a corporation to issue its bonds *only* when the measure is sanctioned by a majority of the voters, bonds issued without such a sanction (either in fact or according to the decision of authorized officers or some authorized body or tribunal), or when voted to one corporation and issued to another, are void, into whosoever hands they may come.² This is the sound and true rule of law on this subject, and the one which has had the uniform approval of the state courts in this country, and it has also received the high sanction of the Supreme Court of the United States.³ The distinction, however, must be remembered, between want of power to issue the bonds and irregularities in the exercise of the power, which are unavailing against the *bona fide* holder, without notice of the irregularity.

¹ *Ante*, chap. VI. sec. 108. The provisions of a railroad charter made it lawful for certain counties to subscribe stock on a majority vote, and, on such vote being had, made it the *duty* of the county commissioners to subscribe for stock and issue bonds therefor. Accordingly a vote was had, resulting in favor of a subscription; *after* the vote, but *before* the subscription was actually made and the bonds issued, counties were prohibited by law from subscribing for stock, unless paid for in cash. Held, that the power to subscribe and the vote did not constitute a contract within the meaning of the clause of the constitution making contracts inviolable; that until the subscription was actually made the contract was unexecuted, and that bonds thus issued were void, even in the hands of innocent holders for value. *Aspinwall v. County of Jo Daviess*, 22 How. (U. S.) 364, 1859. *Ante*, sec. 42; *Marsh v. Fulton County*, 10 Wall. 676.

² *Ante*, chap. VI. sec. 108.

³ *Marsh v. Fulton County*, 10 Wall. 676, 1870. Speaking of this subject, Mr. Justice *Field*, in the case just cited, delivering the opinion of the

Court, says: "But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds, without notice of their invalidity. If such were the fact, we do not perceive how it could affect the liability of the county of Fulton. This is not a case where the party executing the instruments possessed a general capacity to contract, and where the instruments might, for such reason, be taken without special inquiry into their validity. It is a case where the power to contract never existed—where the instruments might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to the action of the officers of the county and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as innocent purchaser can be claimed by the holder. This is the law even as respects commercial paper, alleged to have been issued under a delegated authority, and is stated in the case of *Floyd Acceptances*, 7 Wall. 666. In speaking of notes and bills issued or accepted by an agent, acting under a general or special power, the court says: 'In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued.'" And in this case the bonds of the county of Fulton, though negotiable in form, and not disclosing or reciting their purpose or origin, were held void, in the hands of *bona fide* holders, for want of authority in the county to issue them—having been voted to one corporation and delivered to (according to the view of the court) another and distinct corporation. See *Society, &c. v. New London*, 29 Conn. 174; compare, *People v. Mead*, 36 N. Y. 224; *Adams v. Railroad Company*, 2 Coldw. (Tenn.) 645; *Lynde v. Winnebago County*, Sup. Ct. U. S. 1872; *Steines v. Franklin County*, 48 Mo. 167, 1871; *Super. v. Weider*, 5 Chicago Legal News, 265.

Defences grounded on corporate neglect, or technical in their nature, are not favored when the bonds are in innocent hands. *Maddox v. Graham*, 2 Met. (Ky.) 56; *Commonwealth v. Pittsburgh*, 43 Pa. St. 391; *San Antonio v. Lane*, 32 Texas, 405. The issue of the bonds proves that conditions precedent, imposed by *ordinance*, have been complied with or waived. *Commonwealth v. Pittsburgh, supra*; *Gilchrist v. Little Rock*, 1 Dillon C. C. 261.

The Supreme Court of the United States has very recently held, in an action on negotiable bonds issued by a public corporation, that where the defendant has shown *fraud in the origin or inception* of the instruments, this will throw upon the holder the burden of showing that he gave value for them before maturity. *Smith v. Sac County*, 11 Wall. 139, 1870, *Clifford, J.*, dissenting.

When *special authority to borrow money* or to subscribe to the stock of a railroad company will *impliedly repeal existing charter limitations* upon the



